Supreme Court, U. S.
FILED
AUG 28 1979
MICHAEL RODAK, JR., CLERK

No. 79-325

In the

Supreme Court of the United States

OCTOBER TERM, 1979

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et al.,

Petitioners,

v.

CLARENCE A. ANDERSON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

FRANCIS D. MORRISSEY
THOMAS F. BRIDGMAN
PETER J. MONE
BAKER & MCKENZIE
130 E. Randolph Drive
Chicago, Illinois 60601
312/861-2819

ROGER C. MINAHAN
MINAHAN & PETERSON, S.C.
815 E. Mason Street
Milwaukee, Wisconsin 53202
414/276-1400

Attorneys for the Petitioners, The Grand Bahama Development Company, Ltd., a Bahamian corporation; America Devco, Inc., a Delaware corporation; American International Realty Corporation, an Illinois corporation; Intercontinental Diversified Corp., a Panamanian corporation; and Bahama Realty Corporation

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

INTRODUCTORY STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The Appellate Court of Illinois Has Decided a Federal Question of Substance Contrary to Applicable Decisions of the United States Supreme Court and Federal Courts of Appeals and Federal District Courts 7

II. The Decision of the Appellate Court of Illinois Will Place a Serious Burden on Real Estate Development Which Was Never Intended by Congress 18

CONCLUSION 26

APPENDICES 1a

Opinion of the Appellate Court of Illinois 1a

Order of the Supreme Court of Illinois 10a

Decision on Motion to Dismiss, *Bubula* v. *The Grand Bahama Development Co.*, No. 73 C 3131 (N.D. Ill. June 27, 1974) (unreported decision) (Ex. A) 11a

Decision on Motion to Dismiss First Amended Complaint, *Bubula* v. *The Grand Bahama Development Co.*, No. 73 C 3131 (N.D. Ill. December 18, 1974) (unreported decision) (Ex. B) 15a

PAGE

Acceptance and Guarantee (Ex. C) 17a

Public Property Report of The Grand Bahama Development Company, State of Illinois, Illinois Installment Land Sales Section (Ex. D) 24a

TABLE OF CITATIONS

CASES

Bubula v. *The Grand Bahama Development Co.*, No. 73 C 3131 (N.D. Ill. June 27, 1974) (unreported decision) 12, 13, 16

Contract Buyers League v. *F & F Investment*, 300 F.Supp. 210 (N.D. Ill. 1969), *aff'd* 420 F.2d 1191 (7th Cir. 1970) 9, 10

Davis v. *Rio Rancho Estates, Inc.*, 401 F.Supp. 1045 (S.D.N.Y. 1975) 11, 15, 16

Enterprise Irrig. District v. *Farmers' Mut. Canal Co.*, 243 U.S. 157 (1916) 18

Flournoy v. *Wiener*, 321 U.S. 253 (1943) 18

Fogel v. *Sellamerica, Ltd.*, 445 F.Supp. 1269 (S.D.N.Y. 1978) 14, 15

Happy Investment Group v. *Lakeworld Properties, Inc.*, 396 F.Supp. 175 (N.D. Cal. 1975) 10, 11, 16

McCown v. *Heidler*, 527 F.2d 204 (10th Cir. 1975) 14, 15

Polikoff v. *Levy*, 55 Ill. App.2d 229, 204 N.E.2d 807 (1st Dist.), *cert. denied*, 382 U.S. 903 (1965) 17

SEC v. *W. J. Howey Co.*, 328 U.S. 293 (1946) ..7, 8, 9, 15

Sire Plan Portfolios, Inc. v. *Carpentier*, 8 Ill. App. 2d 354, 132 N.E.2d 78 (1st Dist. 1956) 17

Teamsters v. *Daniel*, ... U.S. ....., 58 L.Ed.2d 808 (1979) 23

Timmreck v. *Munn*, 433 F.Supp. 396 (N.D. Ill. 1977) .. 14

PAGE

United Air Lines v. *Mahin*, 410 U.S. 623 (1972) 18

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837 (1975) 7, 9, 16, 21

Woodward v. *Terracor*, 574 F.2d 1023 (10th Cir. 1978) 14, 15, 16

STATUTES

15 U.S.C. §§ 77a *et seq.* 2

15 U.S.C. § 77b(1) 2

15 U.S.C. §§ 1701 *et seq.* 21

28 U.S.C. § 1257(3) 2

Ill. Rev. Stat. ch. 121½, § 137.1 *et seq.* 5

Ill. Rev. Stat. ch. 121½, § 137.2 ..... 2, 5

Ill. Rev. Stat. ch. 30, §§ 371 *et seq.* 24

MISCELLANEOUS

Hearings on S.275 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) 22

"Offers and Sales of Condominiums or Units in a Real Estate Development," SEC Release No. 33-5347, 38 Fed. Reg. 1735 (Jan. 18, 1973) 20, 24, 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et al.,

Petitioners,

v.

CLARENCE A. ANDERSON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

INTRODUCTORY STATEMENT

The Grand Bahama Development Company, Limited; America Devco, Inc.; American International Realty Corporation; Intercontinental Diversified Corp.; and Bahama Realty Corporation petition this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, Fifth Division.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, Fifth Division, is reported at 67 Ill. App. 3d 687, and at 384 N.E. 2d 981 (1979), and is appended

hereto (App. 1a). The order of the Supreme Court of Illinois denying petitioners' Petition for Leave to Appeal is also appended hereto (App. 10a).

JURISDICTION

The opinion of the Appellate Court of Illinois, First District, Fifth Division, was entered on December 22, 1978, and a timely Petition for Rehearing was denied on January 25, 1979. Petitioners' timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on May 31, 1979, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the contracts for the purchase of fee simple interests in lots in a real estate development executed by respondents constitute securities in the form of investment contracts within the meaning of the Federal Securities Act of 1933, 15 U.S.C. § 77b(1), and the Illinois Securities Law of 1953, Ill. Rev. Stat. ch. 121½, § 137.2-1.

STATUTES INVOLVED

15 U.S.C. § 77b(1)

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of

interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

ILL. REV. STAT. CH. 121½, § 137.2-1

"'Security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, investment fund share, face-amount certificate, voting-trust certificate, fractional undivided interest in oil, gas, or other mineral lease, right, or royalty, option, put, call, privilege, indemnity or any other right to purchase or sell a contract for the future delivery of any commodity offered or sold to the public and not on a registered contract market, or, in general, any interest or instrument commonly known as a security, or any certificate of deposit for, certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

STATEMENT OF THE CASE

Respondents, all residents of Illinois, include the named plaintiffs and other members of a purported class of individuals who purchased platted, unimproved real property in a development in Lucaya, Grand Bahama Island, Bahamas, from petitioners. Respondents allege that petitioners herein include: (1) The Grand Bahama Development Company, Limited [Development Company], the owner and developer of the real property; (2) America Devco, Inc. [Devco], the holding company for the United States operations of Development Company; (3) Bahama Realty Corporation [Bahama], the holder of the exclu-

sive sales rights in the United States for property in the development; (4) American International Realty Corporation, the exclusive franchisee or agent of Bahama for the sale in Illinois of development property; and (5) Intercontinental Diversified Corp., the parent or related corporation of Development Company, Bahama, and Devco.

Respondents executed land contracts, which provided that the purchasers would be given deeds conveying fee simple title to the residential lots purchased upon payment in full of the purchase price (R. 57, R. 255, App. Ex. C, D). Petitioners had no interest in the property after it was sold other than retention of title to secure the unpaid balance of the purchase price.

The land contracts specifically stated that petitioners would not negotiate resales of land or of any purchaser's interest in land contracts (R. 259, App. Ex. D). The land contracts contained no promises, representations, or agreements that petitioners would develop, manage, or control any property they sold for the benefit or profit of the purchasers (R. 57, App. Ex. C).

Petitioners did agree to make improvements in the development in which respondents purchased property (R. 57, App. Ex. C). These improvements were to include roads, walkways, waterways, utilities, parks, and other community facilities (R. 257, App. Ex. D). They were to be financed initially out of petitioners' general revenues and maintained subsequently with service fees assessed to property owners in the development (R. 57, 257, App. Ex. C, D). All fees paid by property owners above and beyond the initial purchase price of their property were expressly limited to being used for the

care and maintenance of these community facilities (R. 57, App. Ex. C).

Petitioners also planned to construct other amenities such as a golf course, marina, and casino on the island on which respondents purchased property. Petitioners had no contractual obligation to respondents to construct these improvements, and respondents had no legal, equitable or financial interest in or involvement with any of the developments beyond their lot lines (Pl. Br. pp. 7, 13).

Respondents were provided with public property reports prior to the sales (R. 57, App. Ex. D). The sales efforts of petitioners were, as respondents have admitted, "directed at buyers for residential or resort purposes," although respondents have alleged that they purchased property in the development for investment purposes (Pl. Br. p. 12).

Respondents brought this action against petitioners in the Circuit Court of Cook County, Illinois, seeking rescission of their land sales contracts because, *inter alia*, petitioners were alleged to have violated the provisions of the Federal Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*, and the Illinois Securities Law of 1953, Ill. Rev. Stat. ch. 121½, §§ 137.1 *et seq*. Respondents contend that the land contracts involved herein are "securities" and, more specifically, "investment contracts" as those terms are used in 15 U.S.C. § 77b(1) and Ill. Rev. Stat. ch. 121½, § 137.2-1, so that the provisions of the Federal Securities Act of 1933 and the Illinois Securities Law of 1953 are applicable to this transaction. Respondents also allege that petitioners violated the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 *et seq*. That cause of action is not involved in the instant petition.

How the Federal Questions Were Presented

Petitioners filed a motion to dismiss respondents' claim under the Federal Securities Act and the Illinois Securities Law on the ground that it failed to state a cause of action. The Circuit Court of Cook County granted this motion, holding that the land contracts entered into by respondents did not constitute securities within the meaning of the Federal Securities Act or the Illinois Securities Law.

Respondents appealed this decision to the Appellate Court of Illinois, First District, Fifth Division, which held that respondents had stated a cause of action under the Federal Securities Act and the Illinois Securities Law because they had alleged sufficient facts to establish that the land sales contracts involved herein were investment contracts under the test established by this Court in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946). The Appellate Court of Illinois reversed the decision of the Circuit Court and remanded the case for further proceedings not inconsistent with its opinion. A timely Petition for Rehearing to the Appellate Court of Illinois was denied on January 25, 1979.

Petitioners filed a Petition for Leave to Appeal to the Supreme Court of Illinois, asking that court to review and reverse the holdings of the Appellate Court of Illinois. That petition was denied on May 31, 1979.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT OF ILLINOIS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE CONTRARY TO APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND FEDERAL COURTS OF APPEALS AND FEDERAL DISTRICT COURTS.

The Appellate Court of Illinois, First District, Fifth Division, has decided that land contracts for residential lots in a land development project constitute securities under the Federal Securities Act and the Illinois Securities Law when such a project includes plans for roads, utilities and other community faciilties that directly serve the lots being sold and plans for amenities such as golf courses and marinas that indirectly serve the lots involved, although the purchasers of the lots have no direct interest in the profits of the project and although the project owners have no involvement with or control over the lots that have been sold. The decision of the Appellate Court of Illinois on this federal question is not in accord with the decisions of this Court in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946) and *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), nor is it in accord with the decisions of the lower federal courts that have considered this issue.

In *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, this Court held that land contracts constituted "investment contracts" which were "securities" under the terms of the Federal Securities Act of 1933 when those land contracts were for strips of land that were not separately fenced, that carried a uniform price per acre based on the number of trees on the parcel, and that were accompanied by service contracts under which the landowner paid for cultivation of the trees on his land and in return received a share of

the net profits from the cultivation and marketing of the crops. This Court stated as follows:

> "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." 328 U.S. at 299.

The defendant companies in *Howey,* this Court held, offered "something more than fee simple interests in land" *Id.*; what they offered was "an opportunity to contribute money and to share in the profits of a large . . . enterprise." *Id.* This opportunity was offered to parties who had neither the ability nor the desire to occupy the land or develop it themselves and who were attracted "solely by the prospects of a return on their investment." 328 U.S. at 300. In *Howey* the transfer of rights in land was "purely incidental," with the land contracts and warranty deeds serving only as "a convenient method of determining the investors' allocable shares of the profits." *Id.*

This Court concluded that the sales arrangements in *Howey* constituted investment contracts because investors provided the capital and shared proportionately in the earnings and profits, while the promoters managed, controlled, and operated the enterprise. The test of whether a land contract or any other contract constitutes an investment contract, stated this Court, is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. at 301.

The reasoning in *Howey* was applied to a case involving the purchase of residential apartment units in a cooperative housing project in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837. Therein the purchasers contended that their apartment purchases constituted "investment contracts" because, *inter alia,* as individual members of the cooperative they stood to benefit from profits made by the cooperative as a whole from the operation of its commercial facilities, including offices and parking spaces. This Court held that such an indirect benefit was too speculative and insubstantial to bring the entire transaction within the Securities Act. This Court noted in *United Housing* that when it referred to profits derived from the efforts of others in the *Howey* test, it meant either "capital appreciation resulting from the development of the initial investment" by the promoters, or "a participation in earnings resulting from the use of investors' funds" by the promoters. 421 U.S. at 852. This Court found that neither of these types of profits resulting from the efforts of promoters had accrued to the purchasers of apartment units in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837.

This Court has not considered the issue of whether a contract for the sale of a fee simple interest in real estate in a development project constitutes an "investment contract" under the Federal Securities Act of 1933. A number of federal circuit and district courts have considered this issue. They have concluded that under the applicable decisions of this Court such contracts are not investment contracts.

In *Contract Buyers League* v. *F & F Investment,* 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd* 420 F.2d 1191 (7th Cir. 1970), a class of black plaintiffs brought an action

seeking relief for sales of used residential property to them at allegedly higher prices and more burdensome terms than white purchasers would have been charged. One count of plaintiffs' complaint alleged violations of the Securities Exchange Act of 1934. In dismissing that cause of action, the district court quoted from 1 Loss, Securities Regulation, 491-2 (2d ed., 1961) as follows:

> "'The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no "investment contract" is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.'" 300 F.Supp. 210, 224.

The district court recognized that many real estate purchasers hope that the land they buy will appreciate in value, but went on to point out, "To conclude that the natural desire of any purchaser that his purchase should appreciate in value makes a 'security' of what has been purchased, is obviously to so muddle the term as to make it meaningless." 300 F.Supp. 210, 224.

The district court concluded, "[I]t would be a gross and unsupported enlargement of the presently exercised jurisdiction and responsibility of the Securities and Exchange Commission to hold that the common sale of residential real estate by installment contract is subject to the federal securities laws." 300 F.Supp. 210, 225.

The rules set down in *Howey* and *Contract Buyers League* were applied in *Happy Investment Group* v. *Lakeworld Properties, Inc.,* 396 F. Supp. 175 (N.D. Cal. 1975),

in which case plaintiffs bought lots in a recreational subdivision owned and developed by defendants. Plaintiffs asserted a claim under the Securities Exchange Act of 1934.

In *Happy Investment Group,* 396 F. Supp. 175, defendants not only sold lots to plaintiffs but also undertook the installation of roads and utilities in the subdivision and ran a program to help the purchasers resell their lots if they so desired. Sales information made available by defendants emphasized that they were creating an entire resort community and that anyone who purchased in the community would be making an excellent investment. However, defendants entered into no service or managerial contracts with land purchasers.

Under these facts in *Happy Investment Group,* the district court rejected plaintiffs' contention that the contracts for the purchase of lots constituted securities. The district court noted that although the value of plaintiffs' land might increase, that alone would not be sufficient to make a land contract a security where the land owned by plaintiffs was not itself developed or operated by others. In addition, the district court noted that for the community to fully develop, plaintiffs would have to build homes on their lots, which would negate the *Howey* requirement that under an investment contract, profits must result solely from the efforts of others.

In *Davis* v. *Rio Rancho Estates, Inc.,* 401 F. Supp. 1045 (S.D.N.Y. 1975), the facts were similar to those in *Happy Investment Group* v. *Lakeworld Properties, Inc.,* 396 F. Supp. 175. In *Davis,* the district court held that the sale of land did not constitute an investment contract for purposes of the Securities Exchange Act. After reading defendant's promotional materials, the district

court held that it was not possible to say that the development involved was being promoted as a pure investment rather than as a residential community, which might incidentally be a good investment. The district court expressly stated that the construction of roads and other improvements by the developer was not the type of managerial service that would turn land sales into investment contracts and that plaintiffs' expectation of a profit on resale was insufficient to transform a sale of real property into an investment contract.

The decision in *Howey* has been applied in a case arising out of the same set of facts involved in the instant case in *Bubula* v. *The Grand Bahama Development Company, Ltd.*, No. 73 C 3131 (N.D. Ill. June 27, 1974) (unreported decision) (R. 247-51, App. Ex. A):

> "The complaint alleges that plaintiffs entered into written contracts with defendants to purchase undeveloped land on the Grand Bahama Island. The contracts attached to the complaint are more or less standard forms of purchase agreements applicable to many different kinds of real estate transactions. The principal clause allegedly making this a common enterprise is Note 7 which provides:
>
> > "'All annual sums received as a part of the purchase consideration of this Acceptance and Guarantee will be used solely to repair, maintain, improve, construct, and operate facilities for the general welfare of land owners in subdivisions developed or to be developed in the future by the Grand Bahama Development Company Limited.'
>
> "The term 'annual sums' in the foregoing clause refers not to the purchase price of the land but to a relatively small annual 'service' charge payable for 99 years for making and maintaining common utilities and other improvements.

> "It will be noted, also, that this clause does not give, the purchasers any interest in property other than their own lots and does not provide them with the chance of future profits 'solely from the efforts of the promoter or a third party,' as required by *SEC* v. *Howey & Co. et al., supra;* Cf. *Contract Buyers League* v. *F & F Investment,* 300 F.Supp. 210 223-4 (N.D. Ill. 1969), *aff'd* 420 F.2d 1191 (7th Cir. 1970).
>
> "Plaintiffs allege that defendants made certain oral and written representations about the nature and value of the land. These are not part of the 'security' represented by the purchase agreement, and are specifically excluded from it by Note 2. . . . Defendants assumed no written obligation to sell or transfer plaintiffs' property."

The district court in *Bubula* further held that plaintiffs had not stated a cause of action for the violation of the Federal Securities Act or the Illinois Securities Law because the land sales contracts between plaintiffs and defendants were not securities:

> "Plaintiffs' effort to shoehorn their land speculations into the definition of the Securities Acts in our opinion fails. They have alleged only a superficial similarity with the leading cases on this point and have not distinguished their transactions from any other agreement to purchase real estate in undeveloped land. We do not doubt that they were led to expect that their investment could appreciate in value and that much of this would be due to the efforts of the developers (using plaintiffs' money to some extent). However, this is a far cry from a common enterprise in the sense of *Securities and Exchange Commission* v. *Glen W. Turner Enterprises, Inc.,* 474 F.2d 476 (9th Cir. 1973); see also *Lino* v. *City Investing Co.,* 487 F.2d 689 (3rd Cir. 1973); *Roe* v. *United States,* 287 F. 2d 435 (5th Cir. 1961), *cert. denied,* 368 U.S. 824 (1961)."

Moreover, *Woodward* v. *Terracor,* 574 F.2d 1023 (10th Cir. 1978), held that a purchase by plaintiffs of subdivision lots in a residential development did not constitute an investment contract subject to the Federal Securities Act in the absence of any common enterprise between plaintiffs and the developer. The plans for the subdivision included a shopping center, health and cultural facilities, transportation facilities, and a golf course and lake.

The district court in *Woodward* held that the mere fact that plaintiffs had bought lots from defendants did not mean that they were engaged in a common enterprise and noted that defendant had no collateral management contract with the purchasers of the land.

The Appellate Court of Illinois relied heavily upon the trial court decision of *Timmreck* v. *Munn,* 433 F. Supp. 396 (N.D.Ill. 1977), and upon a decision of the Court of Appeals for the Tenth Circuit in *McCown* v. *Heidler,* 527 F.2d 204 (10th Cir. 1975). Additionally, the Appellate Court of Illinois cited the district court decision of *Fogel* v. *Sellamerica, Ltd.,* 445 F. Supp. 1269 (S.D.N.Y. 1978), a case decided subsequent to oral argument before the Appellate Court of Illinois.

In *Timmreck* v. *Munn,* 433 F.Supp. 396 (N.D. Ill. 1977), plaintiffs purchased lots in a residential subdivision. The district court held the sales contracts to be investment contracts because a substantial part of the purchase price for each lot was placed directly into a common fund to be used for major improvements. The district court expressly distinguished the case from *Bubula,* which rested on the same facts as the instant case, on the ground that plaintiffs in *Bubula* paid only a small charge for minor improvements, which was insufficient to create a common enterprise.

In *McCown* v. *Heidler,* 527 F.2d 204 (10th Cir. 1975), and *Fogel* v. *Sellamerica, Ltd.,* 445 F. Supp. 1269 (S.D. N.Y. 1978), district courts held that sales contracts for land in development projects might possibly constitute investment contracts *if* it could be proved that the lots in question were assets to be controlled or managed solely by the developers rather than by the purchasers. In *Fogel* the district court expressly affirmed its prior holding in *Davis* v. *Rio Rancho Estates,* 401 F.Supp. 1045, that where defendants did not promise to run the development and distribute profits to plaintiff there was no investment contract. The effect of *McCown* was limited in *Woodward* v. *Terracor,* 574 F.2d 1023, in which the Court of Appeals for the Tenth Circuit stated that the sellers in *McCown* had contractually promised the buyers that they would make substantial improvements on the property, so that *McCown* did not apply to cases where the sellers simply contracted to deliver title to the buyers.

Significantly, the oral argument before the Appellate Court of Illinois in the instant case was heard before the decision in *Woodward* v. *Terracor,* 574 F.2d 1023, which limited the effect of *McCown.*

Under the applicable decisions of this Court and the lower federal courts, the land contracts involved in the instant case do not constitute investment contracts. Respondents purchased residential land, designated by lots, which was intended for private residential or recreational uses, not fractional undivided interests in commercial property like the interests in *Howey.* Herein improvements on the lots respondents purchased were the sole responsibility of respondents, again in contrast to *Howey* where the seller of the interests was responsible for managing the land. The land prices herein were not uniform, and the buyers acquired no right to a proportional

share of the profits of an enterprise run by the sellers as they had in *Howey.*

The parties herein entered into no agreement that would obligate petitioners to manage, operate or control respondents' property; in fact, the property report that respondents received prior to purchase expressly stated that petitioners had no obligation to resell land sold to respondents or to assist respondents in obtaining profits from the land in any other way. Moverover, Paragraph 2 of the contracts between petitioners and respondents states that petitioners made no promises or undertakings to respondents other than those expressly contained in the land sales contracts. (R. 57, App. Ex. C).

Thus, there was no common enterprise whatsoever between petitioners and respondents in the instant case. In direct contrast to *Howey,* herein only a fee simple interest in land was offered for sale. Unlike *Howey,* the transfers of land herein were the sole reason for the transaction between petitioners and respondents. *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, established that where the principal reason for a transaction is to acquire ownership of property, an incidental interest in or benefit from profits or gains made by others that accrues to the property owner does not render the transaction an investment contract.

While the transfers of fee simple interests in land were accompanied by incidental maintenance services herein, federal courts have held in *Happy Investment Group* v. *Lakeworld Properties, Inc.,* 396 F.Supp. 175 (N.D. Cal. 1975); *Davis* v. *Rio Rancho Estates, Inc.,* 401 F.Supp. 1045 (S.D.N.Y. 1975); *Bubula* v. *The Grand Bahama Development Co.,* No. 73 C 3131 (N.D. Ill. June 27, 1974) (unreported decision), and *Woodward* v. *Terracor,* 574

F.2d 1023 (10th Cir. 1978), that the provision of maintenance services and community facilities such as utilities, roads, and waterways by the sellers of real property does not involve them in a common investment enterprise with the buyers of the property.

While petitioners herein constructed other amenities besides utilities and community facilities on the island on which respondents' land was located, they had no obligation to respondents to do so. Their only obligation to construct these amenities was to the Bahamian government. These amenities were constructed on land in which none of the respondents had any interest, nor did respondents have any interest in the profits derived therefrom.

Therefore, under the applicable decisions of this Court and other federal courts, the land contracts in the instant case cannot be considered securities or investment contracts under the Federal Securities Act. Respondents' cause of action based on that Act should have been dismissed by the Appellate Court of Illinois.

The statutory definitions of the term "security" are virtually identical under the federal and state statutes involved herein, and the purposes of the statutes are identical. Given this parallelism, the Illinois courts have consistently looked to *Howey* and other decisions of this Court and other federal courts construing the federal laws when deciding whether a particular instrument is a security or investment contract under Illinois law. *See Sire Plan Portfolios, Inc.* v. *Carpentier,* 8 Ill. App. 2d 354, 132 N.E. 2d 78 (1st Dist. 1956); *Polikoff* v. *Levy,* 55 Ill. App. 2d 229, 204 N.E. 2d 807 (1st Dist.), *cert. denied* 382 U.S. 903 (1965).

In examining state court decisions based on both federal and state grounds, this Court has stated, "[W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrig. District* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1916). This Court has also held, "[W]here a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here." *Flournoy* v. *Wiener*, 321 U.S. 253, 272 (1943). Thus, when a state court has not decided a question purely as a matter of state law, there does not exist an adequate and independent state ground that eliminates the necessity of this Court's considering the federal question. *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-31 (1972).

In the instant case, the decision of the Appellate Court of Illinois on respondents' state claim followed from its interpretation of the federal statute and federal cases. Therefore, review of that decision by this Court is warranted. A dismissal of the instant case on the basis of the Federal Securities Act also requires dismissal on the basis of the Illinois Securities Law.

II. THE DECISION OF THE APPELLATE COURT OF ILLINOIS WILL PLACE A SERIOUS BURDEN ON REAL ESTATE DEVELOPMENT WHICH WAS NEVER INTENDED BY CONGRESS.

The decision of the Appellate Court of Illinois will have a drastically adverse effect upon real estate development projects in Illinois. Under that decision any developer, promoter or seller of real estate who directly

or indirectly promises to furnish customary facilities such as roadways, recreational facilities or parks will be required to prepare and file a prospectus under the Federal and Illinois Securities Acts. If the opinion of the Appellate Court of Illinois is allowed to stand, developers of real estate tracts will be forced to resort to the cautious expedient of selling unimproved property without any amenities, or alternatively they will be required to increase the price of lots significantly to cover their increased costs of doing business due to compliance with the Federal and Illinois Securities Acts. These increased costs will not add to the value of the lots purchased. Nor will such required compliance enhance the protection of purchasers of real estate, particularly in light of other federal and state disclosure acts applicable to such developments.

The burdens imposed on land development by the decision of the Appellate Court of Illinois exceed the direct costs of complying with the registration and disclosure requirements of the Federal and Illinois Securities Acts. Land sales will also be subjected to the entire regulatory structure of the Securities Exchange Act of 1934. Firms and individuals selling real estate covered by the decision of the Appellate Court of Illinois will be required to register with the Securities and Exchange Commission as securities broker-dealers, with the necessity of passing a general securities examination and complying with the Commission's net capital, reporting, and recordkeeping rules and other regulatory provisions, all of which serve little or no purpose in the land sales context. Those selling real estate will be required to comply with these regulations in addition to complying with state laws governing the licensing of real estate brokers and salesmen.

Not only those who initially sell lots in land developments on behalf of developers will be required to register as broker-dealers, but also if lot owners wish to resell their land, they must do so through registered securities brokers, rather than local real estate brokers. Owners of land in developments similar to that herein thus will be extremely restricted in the resale of their land.

The burden of complying with the provision of the Securities Exchange Act covering brokers and dealers along with the provisions of state laws covering real estate brokers and salesmen has already been placed upon those who sell certain types of condominiums. The Securities and Exchange Commission has taken the position that sales of condominium units are offerings of securities in the form of investment contracts when they are offered in conjunction with agreements by the seller to perform or arrange rental services for the purchaser or in conjunction with participation in a rental pool arrangement by the purchaser. In such cases, the Commission has stated as follows:

> "Persons engaged in the business of buying or selling investment contracts or participations in profit-sharing agreements of this type as agents for others, or as principals for their own account, may be brokers or dealers within the meaning of the Securities Exchange Act, and therefore may be required to be registered as such with the Commission under the provisions of Section 15 of that Act." "Offers and Sales of Condominiums or Units in a Real Estate Development," SEC Release No. 33-5347, 38 Fed. Reg. 1735 (Jan. 18, 1973).

The same burden will be imposed upon salesmen of lots in real estate developments under the decision of the Appellate Court of Illinois.

In addition to curtailing condominium and cooperative developments, the impact of the decision of the Appellate Court of Illinois will be detrimental when, as in the instant case, real estate developments are undertaken in areas in which there are no local property taxes. In such instances, the service charges assessed to lot purchasers are necessary to pay for the basic services that would otherwise be provided by local government and paid for through the tax system.

If allowed to stand the decision of the Appellate Court of Illinois not only will affect future real estate developments but also will invite a large volume of litigation in trial courts throughout the country by those who have purchased property from land developers and who now would seize the opportunity to rescind their purchases whether or not legitimate cause therefor exists. In reliance on prior court decisions, many land developers have undertaken real estate developments and have sold property without complying with the provisions of federal or state securities laws. Further, Congress did not intend the Federal Securities Act of 1933 or the Securities Exchange Act of 1934 to apply to instruments such as the land contracts involved here. "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system . . . ." *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849.

Sales of land in real estate developments are specifically covered by another federal statute, the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 *et seq.* That Act requires the recording and disclosure of information regarding the sale of lots in land development projects.

Any developer who sells such lots must file a detailed statement of record with the Secretary of Housing and Urban Development containing, *inter alia,* a legal description of the land being sold, a detailed description of the development's physical features, and a statement regarding improvements to be made in the development. The developer must also furnish prospective purchasers of lots in a development with a printed property report containing substantially the same information as the statement of record. If a land developer does not comply with these provisions, civil remedies are available to those who purchase land from the developer.

The Interstate Land Sales Full Disclosure Act provides protection to land purchasers similar to the protection afforded to securities purchasers by the Federal Securities Acts. Its legislative history indicates that it was enacted in 1968 precisely because existing laws, including the securities laws, did not cover land sales. Manuel F. Cohen, then Chairman of the Securities and Exchange Commission, stated at Congressional hearings on proposals for a Land Sales Act that "[m]ost land promotions do not come to the attention of the Commission since they are beyond its jurisdiction under present law . . . ." Hearings on S. 275 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967), at 51.

The original proposal for a Land Sales Act was to include land transactions within the existing framework of the Federal Securities Acts. The Land Sales Act was to have been administered by the SEC and land sales were to have been accompanied by a "registration statement" and "prospectus" under that original proposal. As finally enacted, the Land Sales Act is administered by the Department of Housing and Urban Development.

Land sales of the type involved herein must be accompanied by a statement of record and property report containing specified disclosure information. The disclosure philosophy of the Land Sales Act follows the disclosure philosophy of the Federal Securities Acts despite differences between the specific provisions of the two acts based upon the differences in the subjects involved.

Land sales and securities sales differ substantially. Unlike securities, real estate lots have inherent value and individual characteristics that may be especially important to a particular buyer. The uniform description of a fungible securities issue is inappropriate for land offerings. As long as a developer who sells lots meets its obligations to a land purchaser, that purchaser has no vested interest in the developer's profits, unlike a securities purchaser.

For these reasons, the Land Sales Act was tailored to promote disclosure of the type of information pertaining to individual parcels of land that a land purchaser should know. No purpose would be served by subjecting sales of land to the additional requirements of the Federal Securities Acts. The U.S. Congress decided that it would not be appropriate or desirable to impose those requirements on land sales.

In *Teamsters* v. *Daniel,* ..... U.S. ....., 58 L.Ed.2d 808 (1979), this Court held that the Federal Securities Acts did not apply to pension plans. One of the reasons for that decision was the coverage of such plans by the Employee Retirement Income Security Act. This Court reasoned as follows at 822:

> "The existence of this comprehensive legislation governing the use and terms of employee pension

> plans severely undercuts all arguments for extending the Securities Acts to non-contributory, compulsory pension plans. Congress believed that it was filling a regulatory void when it enacted ERISA . . . . Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA."

The Interstate Land Sales Full Disclosure Act was intended to apply to purchases of land. The Federal Securities Acts were not intended to cover such purchases.

The Illinois Land Sales Act of 1969, Ill. Rev. Stat. ch. 30, §§ 371 *et seq,* was enacted in direct response to the federal land sales act. It contains regulatory procedures for intrastate land sales that parallel the procedures of the federal statute. The passage of the Illinois Land Sales Act indicates that the Illinois legislature decided that land contracts were not covered by the Illinois Securities Law.

The Securities and Exchange Commission has maintained the position that contracts for the purchase of land in a real estate development do not constitute securities if the purchaser has no share in the profits of the seller. "The offer and sale of real estate as such, without any collateral arrangements with the seller or others, does not involve the offer of a security." SEC Release No. 33-5347, *supra.* The critical consideration according to the Commission is whether the purchaser of property buys a right to share in profits made by the seller.

The SEC has also specifically stated as follows:

> "In situations where commercial facilities are a part of the common elements of a residential project, no registration would be required under the investment contract theory where (a) the income from such facilities is used only to offset common area expenses and (b) the operation of such facilities is incidental to the project as a whole and is not established as a primary income source for the individual owners of a condominum or cooperative unit." SEC Release No. 33-5347, *supra.*

The Commission's interpretation exempts the land contracts in the instant case from coverage under the Federal Securities Acts.

Virtually every purchaser of real estate, improved or unimproved, hopes that the property will appreciate in value and wants to make a profit on a subsequent sale of the property. Such subjective intent does not, however, render a land contract a security or investment contract. If such were the rule, any purchase wherein the buyer hoped to realize a profit would subject the transaction to coverage under the Federal Securities Acts.

The Federal Securities Acts were never intended to cover land contracts. Therefore, the decision of the Appellate Court of Illinois imposing such coverage should be reversed.

CONCLUSION

Wherefore, for the foregoing reasons Petitioners pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FRANCIS D. MORRISSEY
THOMAS F. BRIDGMAN
PETER J. MONE
BAKER & MCKENZIE
130 E. Randolph Drive
Chicago, Illinois 60601
312/861-2819

ROGER C. MINAHAN
MINAHAN & PETERSON, S.C.
815 E. Mason Street
Milwaukee, Wisconsin 53202
414/276-1400

Attorneys for the Petitioners, The Grand Bahama Development Company, Ltd., a Bahamian corporation; America Devco, Inc., a Delaware corporation; American International Realty Corporation, an Illinois corporation; Intercontinental Diversified Corp., a Panamanian corporation; and Bahama Realty Corporation.

APPENDICES

Opinion of The Illinois Appellate Court

77-657

CLARENCE A. ANDERSON, et al.,
Plaintiffs-Appellants,

vs.

THE GRAND BAHAMA DEVELOPMENT COMPANY, LTD., a Bahamian corporation, et al.,
Defendants-Appellees.

Appeal From The Circuit Court of Cook County.
Honorable RAYMOND K. BERG, *Judge Presiding.*

Mr. JUSTICE WILSON delivered the opinion of the court:

Plaintiffs, purchasers of unimproved real property in Lucaya, Grand Bahama Island, appeal the trial court's dismissal of three counts of their four count complaint for failure to state a cause of action under either the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1975, ch. 121 ½, pars. 137.1 et seq.) or under the Securities Act of 1933. (15 U.S.C. §§77a et seq. (1976).) The fourth count of the complaint involved a violation of the Interstate Sales Act. (15 U.S.C. §1709 (1976).) That count is not involved in this appeal. The sole issue raised is whether plaintiffs' complaint states a violation of either the Illinois or Federal Securities Laws. We reverse and remand.

The dismissal in this case was granted in response to defendants' motion to dismiss for failure to state a cause of action.[1] Under the rules of pleading in Illinois, the

[1] Defendants also moved the trial court to dismiss this cause of action pursuant to section 48 of the Illinois Civil Practice Act. (Ill. Rev. Stat. 1975, ch. 110, par. 48.) The court did not rule on that motion.

motion to dismiss for failure to state a cause of action is a section 45 motion. (Ill. Rev. Stat. 1975, ch. 110, par. 45.) A section 45 motion attacks the legal sufficiency of the complaint. In considering a section 45 motion, a court considers only the allegations made in the complaint and exhibits attached thereto. A section 45 motion should be granted *only* if "it appears that no set of facts could be proven under the pleadings which would entitle plaintiff(s) to relief." (*Huebner* v. *Hunter Packing Co.* (1978), 56 Ill. App. 3d 563, 565, 375 N.E.2d 873, 875.) Therefore, it is our task to look to plaintiffs' pleadings and determine whether any set of facts could be proven under the pleadings which would entitle them to relief.

The plaintiffs, all residents of Illinois, include named plaintiffs and other members of a class of individuals who were sold interests in unimproved property in Lucaya, Frand Bahama Island [Lucaya Development] by the defendants. The interests were evidenced by land installment contracts. Defendants include: (1) The Grand Bahama Development Company, Limited [Development Company], the owner and developer of the real property, (2) American Devco., Incorporated [Devco], the holding company for the United States operations of Development Company, (3) Bahama Realty Corporation [Bahama], the holder of the exclusive sales rights in the United States for property in the development, (4) American International Realty Corporation, the exclusive franchisee or agent of Bahama for the sale in Illinois of development property, and (5) Intercontinental Diversified Corporation, the parent or related corporation of Development Company, Bahama, and Devco. Plaintiffs allege that the sales of the interests, as represented by the total promotional and selling efforts of defendants, represent more than sales of unimproved real estate. They contend that each sale constituted the sale of an investment contract, which is a security under both Illinois and Federal Securities Laws, and as such required compliance with the appropriate securities law.

Count I states a violation of the registration requirements of the Illinois Securities Law of 1953. (Ill. Rev. Stat. 1975, ch. 121½, par. 137.5.) In this count, plaintiffs set forth the basic allegations of their complaint in a section entitled, *The Investment Scheme.* They allege that defendant, Development Company, by or through itself, its parent, subsidiary or affiliate corporations, acquired substantially all of the land in the Lucaya area on Grand Bahama Island and developed it in accordance with a Master Plan [Plan]. This Plan called for the construction of facilities desirable for a complete community, including roads, utilities, schools, recreational facilities, parks, greenways, churches, waterways, water reserves, beaches, marinas, golf courses, shopping complexes, and resort hotels, in or near the Lucaya Development. Plaintiffs contend that this Plan has been followed from the time of its preparation to the time of this complaint.

They next allege that in mid-1960, defendants instituted an extensive advertising and promotional campaign aimed "at any prospective market, and particularly at purchasers, of such land for investment purposes only." Paragraph 16 of plaintiffs' complaint contains extensive samplings of the investment-orientation of the promotional and advertising materials. Also, plaintiffs attached copies of a number of the purchase forms used in the sales. Some of these forms contained boxes for an indication of whether the interest in the property was being purchased for investment or residential purposes.

The last paragraph of the allegations setting forth *The Investment Scheme* makes it clear that plaintiffs could not, nor were they expected to do anything to increase the value of their investment. It alleged that:

> "land purchased by investors 'to hold for the future' would become invaluable and salable for tourists, persons who were in the business of constructing housing, particularly multi-family and high-rise types of housing, and businesses on Grand Bahama Island,

Solely by virtue of the development, advertising and promotion of the Island and of the Lucaya Development Company, its parent, subsidiary or affiliate corporations, adherence to the Master Plan, and consequent increase in tourism, permanent residents and businesses." (Emphasis added.)

Count II repeats the basic allegations made in Court I and states a violation of the registration requirements of the Securities Act of 1933. (15 U.S.C. §77f (1976).) Count III states a violation of the anti-fraud provisions of the Federal Securities Act (15 U.S.C. §§77g and 77w (1976).) In addition to the basic allegations made in Count I, Count III alleges that defendants made, participated in making, or approved of certain representations, including:

"(b) The property in the Lucaya Development would increase in value;

(c) Investors would be able to sell their investment contracts at a profit or 'trade-up' to more valuable property;

(d) Other people had made substantial profits on their investments in the Lucaya Development;

(e) Development Company's efforts, by or through itself, its parent, subsidiary or affiliate corporations, would result in the Lucaya Development increasing in value without any effort on the part of investors.

Also, plaintiffs alleged that defendants failed to disclose or participated in or approved the failure to disclose that the sales price of the purchased land bore no reasonable relation to the fair market value of the land and that the investor who was interested in reselling his interest would be in direct competition with the Development Company. The basic relief sought by plaintiffs, in all counts, was rescission of their contracts.

OPINION

The crucial factor in our determination of whether plaintiffs have made out a cause of action in Counts I, II, and III, is the characterization which we give to the interests which plaintiffs purchased from defendants. Defendants contend that plaintiffs purchased "interests in real estate, with the hope that they could realize gain by such ownership, or by their own sales of the land." Plaintiffs contend that they purchased investment contracts with the hope of obtaining profits solely from the efforts of defendants.

In *Securities & Exchange Commission* v. *Howey* (1946), 328 U.S. 293, 90 L. Ed. 1244, 66 S. Ct. 1100, the United States Supreme Court defined investment contract as:

"A contract, transaction or scheme whereby a person (1) invests his money (2) in a common enterprise (3) and is led to expect profits (4) solely from the efforts of the promoter or a third party * * *." (328 U.S. at 298-99, 90 L.Ed. 1244, 66 S. Ct. 1100.)

In explaining the definition, the Court indicated that the definition embodied a "flexible rather than a static principle * * * capable of adoption to meet the countless and valuable schemes devised by those who seek the use of the money of others on the promise of profits." (328 U.S. at 299, 90 L. Ed. 1244, 66 S. Ct. 1100.) This definition and broad construction has been adopted in Illinois. (*Polikoff* v. *Levy* (1965), 55 Ill. App. 2d 229, 204 N.E. 2d 807.) Therefore, paintiffs must allege sufficient facts to meet the broad test of *Howey* if their interests are to be characterized as investment contracts under either the Illinois or Federal Securities Laws.

Several recent cases have extended the *Howey* test to situations involving the purchase of land in a subdivision or development. (*Fogel* v. *Sellamerica, Ltd.* (1978), Supp. 396; *McCown* v. *Heidler* (1975), 527 F.2d 204.) In *Fogel,* the court denied defendants' motion for a summary judgment, with leave to renew, when it found that it was

not clear whether there was a common enterprise between the parties. In *Timmerack,* the court denied defendants' motion to dismiss when it could not determine whether plaintiffs had pleaded a claim cognizable under the securities laws from the materials presented by plaintiffs. In *McCown,* the court found that the trial court had ruled incorrectly when it denied plaintiffs' attempt to amend their complaint to include allegations of security law's violations. Each of these cases emphasized the importance of viewing all the facts to determine the nature of the involved transaction. *Fogel* at 1277; *Timmerack* at 401-403; *McGown* at 208.

Defendants contend that the relevant facts of this transaction are only the terms of the contract between the parties and the terms of a property report referred to in the contract. As support, they cite to language in *Bubula* v. *The Grand Bahama Development Co.,* No. 73 C 3131 (N.D. Ill. 6/27/74), an earlier case involving a suit arising out of the same facts as the present suit. However, this language has been specifically criticized by *Timmerack* v. *Munn* (1977), 433 F. Supp. 396. In *Timmerack,* the United States District Court for the Northern District of Illinois made it clear that the facts of a transaction include not only the terms of the contract but also the specific oral and written representations made by defendants in their promotional and advertising compaign which was aimed at inducing plaintiffs to purchase land. In that case it was alleged that defendants had stated that they would provide specific improvements and amenities which would substantially increase the value of the land which plaintiffs had purchased. We think that the *Timmerack* rule is the better rule.

Looking at the terms of the contract and the representations allegedly made by defendants in this case, we find that plaintiffs have made the proper allegations in support of a finding that an investment contract existed so as to withstand defendants' section 45 motion. Plaintiffs have alleged that they purchased the interest in the land as "investments." Although the motivation of

the purchaser is not controlling, it is one factor which courts have considered in determining a purchaser's interest. (*Fogel* v. *Sellamerica, Ltd.* (1978), 445 F. Supp. 1269.) Another factor which courts have considered is the emphasis of defendants' promotional materials. (*Timmerack* v. *Munn* (1977), 433 F. Supp. 396; *Davis* v. *Rio Rancho Estates, Inc.* (1975), 401 F. Supp. 1045.) Plaintiff's paragraph 16 of their complaint specifically indicates the investment orientation of defendants' promotional materials. Reference is made to language in the materials which advises plaintiffs to purchase land in the Lucaya Development in order to "diversify their 'Investment Portfolio.'" One of the advertising and promotional materials contained a returnable coupon which asked plaintiffs if they were interested in purchasing land for "investment" or other purposes. Other materials referred to the rewards which other "investors" had already reaped. Finally, some of the purchase forms used by defendants specifically requested information on whether plaintiffs intended to purchase the land for residential or investment purposes. This has been considered to have been a significant factor in finding that an investment contract might exist in at least one other case. (*McCown* v. *Heidler* (1975), 527 F.2d 204, 210.) We find it particularly significant here when considered in the context of defendant's alleged representations.

Next, plaintiffs have alleged that their investment would become valuable "by virtue of the development, advertising and promotion of the Island and of the Lucaya Development by (defendants) * * *, adherence to the Master Plan, and consequent increase in tourism, permanent residents and businesses." This allegation meets the requirement that plaintiffs invest their money in a common enterprise. "A common enterprise is one in which the fortunes of the investor are interwoven with the dependent upon the efforts and success of those seeking the investment of of third parties." (*Securities & Exchange Commission* v. *Glenn W. Turner Enterprises, Inc.* (1973), 474 F.2d 476, 482 n.7.) Plaintiffs' allegation clearly indicates that their fortunes are interwoven with and dependent upon the efforts of the defendant.

Defendants argue that there was no common enterprise because: (1) defendants were not contractually obligated to make any improvements, other than those for which plaintiffs were assessed a small annual service fee; and (2) all promised improvements had been performed by defendants. We refuse to accept defendants' first argument for the same reason that we refused to accept the argument that the terms of the contract contain the sole representations made between the parties. Promised improvements may also be found in defendants' promotional materials and utterances. (*Fogel* v. *Sellamerica, Ltd.* (1978), 445 F.Supp. 1269; *Timmerack* v. *Munn* (1977), 433 F.Supp. 396.) As to defendants' second argument, we do not read plaintiffs' allegation as referring to improvements which already have been performed. Plaintiffs' allegation refers to an ongoing scheme which will make their land more valuable. The scheme includes not only development, but also continued advertising and promotion of the land by defendants. Also, plaintiffs have stated that defendants promised that the land would become valuable by adherence to the Master Plan. Although plaintiffs fail to list the continuing construction projects included in the Plan, we think that the improvements which already have been made in accordance with this Plan and which are listed in plaintiffs' complaint are sufficiently suggestive of the types of improvements which can be expected. To resist a motion to dismiss, plaintiffs need allege no more than this.

Lastly, plaintiffs allege that the land will become "valuable and salable to tourists" and others *solely* by virtue of defendants' efforts. They also allege that purchasers of the land could not, nor were they expected to, do anything to increase the value of their investments. These allegations fulfill the final two requirements for an investment contract as stated in *Howey*. First, they fulfill the requirement that plaintiffs' investment was for the purpose of receiving profits. Capital appreciation in property is a recognized form of profit for purposes of meeting this requirement. (*United Housing Foundation, Inc.* v. *Forman* (1975), 421 U.S. 837, 852, 44 L. Ed. 2d 621,

95 S. Ct. 2051; *Timmerack* v. *Munn* (1977), 433 F. Supp. 396, 402 n.3.) Second, they fulfill the requirement that the profits be obtained solely through the efforts of defendants. In fact, plaintiffs' allegations stress the fact that they *could do nothing* to increase the value of investments.

For the foregoing reasons, we hold that plaintiffs have made out a proper cause of action under both Federal and Illinois Securities Laws. Therefore, we reverse and remand with instructions that the trial court conduct further proceedings not inconsistent with this opinion.

Reversed and remanded.

LORENZ AND MEJDA, J.J., *concur*.

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 31, 1979

Mr. Francis D. Morrissey
Attorney at Law
Baker & McKenzie
130 East Randolph Dr.
Chicago, IL 60601

The Grand Bahama Development Company, Ltd., a Bahamian corporation; et al., etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

No. 51734 - Clarence A. Anderson, et al., respondents, vs.
The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,,

/s/ Clell L. Woods
Clerk of the Supreme Court

UNITED STATES OF AMERICA

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of May in the year of our Lord, one thousand nine hundred and seventy-nine, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood
Justice Howard C. Ryan
Justice Thomas J. Moran
Justice Daniel P. Ward
Justice William G. Clark
Justice Thomas E. Kluczynski

William J. Scott, Attorney General
Louie F. Dean, Marshal
Attest: Clell L. Woods Clerk
Received Jul 12 1979

Be It Remembered, that, to-wit: on the 31st day of May 1979 the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:
Clarence A. Anderson, et al.,

Respondents,

vs.

No. 51734

The Grand Bahama Development Company, Ltd., a Bahamian corporation; America Devco, Inc., a Delaware corporation; American International Realty Corporation, an Illinois corporation; Inter-Continental Diversified Corp., a Panamanian corporation; and Bahama Realty Corporation,

Petitioners.

Petition for Leave to Appeal from Appellate Court First District.

77-657

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioners costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 25th day of June, 1979.

/s/ Clell L. Woods

Clerk,

(Seal)

Supreme Court of the State of Illinois

EXHIBIT A
UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

JOHN S. BUBULA and FRANK V. PANTALEO, on their behalf and on behalf of all persons similarly situated,

Plaintiffs,

vs.

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a company incorporated under the laws of the Bahama Islands; AMERICAN DEVCO, INC., a Phillipine corporation; and AMERICAN REALTY CORPORATION, an Illinois corporation,

Defendants.

No. 73 C 3131

DECISION ON MOTION TO DISMISS

This cause comes on to be heard on the motion of all defendants to dismiss the complaint for failure to state a claim upon which relief can be granted and alternatively for the additional reason that the claims are barred by the applicable statute of limitations. The complaint is filed as a purported class action to enforce claims arising under Sec. 12(1) of the Securities Act of 1933 and Sec. 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. We find and conclude that the complaint should be dismissed because defendants did not sell a "security" as defined in Sec. 2(1) of the Securities Act or Sec. 3(a)(10) of the Exchange Act. We alternatively find and conclude that the cause of action under Sec. 12(1) of the Securities Act is barred by the one-year limitation of Sec. 13 of that Act (15 U.S.C. §77m) but that the cause of action under Sec. 10(b) may have been concealed by the defendants and thus not barred if it was not discoverable by plaintiffs during the applicable three year statutory period. *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972).

The plaintiffs have attempted to fit their purchase agreement for undeveloped land into the mold of a "security" as defined in Sec. 2(1) of the Securities Act (15 U.S.C. §77b(1)). This statutory definition is as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The foregoing definition has been construed by the courts to require some kind of "common enterprise" between the purchasers and sellers. cf. *S.E.C.* v. *Howey & Co., et al.*, 328 U.S. 293 (1946). A common enterprise is further defined to be an investment by which the buyer is led to expect participation in profits generated by the seller.

The complaint alleges that plaintiffs entered into written contracts with defendants to purchase undeveloped land on the Grand Bahama Island. The contracts attached to the complaint are more or less standard forms of purchase agreements applicable to many different kinds of real estate transactions. The principal clause allegedly making this a common enterprise is Note 7 which provides:

> All annual sums received as a part of the purchase consideration of this Acceptance and Guarantee will be used solely to repair, maintain, improve, construct and operate facilities for the general welfare of land owners in subdivisions developed or to be developed in the future by the Grand Bahama Development Company Limited.

The term "annual sums" in the foregoing clause refers not to the purchase price of the land but to a relatively small annual "service" charge payable for 99 years for making and maintaining common ultilities and other improvements.

It will be noted, also, that this clause does not give the purchasers any interest in property other than their own lots and does not provide them with the chance of future profits "solely from the efforts of the promoter or a third party", as required by *S.E.C.* v. *Howey & Co., et al., supra;* cf. *Contract Buyers League* v. *F. & F* 300 F. Supp. 210, 223-4 (N.D. Ill. 1969), aff'd 420 F.2d 1191 (7th Cir. 1970).

Plaintiffs allege that defendants made certain oral and written representations about the nature and value of the land. These are not part of the "security" repre-

sented by the purchase agreement, and are specifically excluded from it by Note 2. Also, some two years after the original agreements were signed, defendants allegedly induced plaintiffs to "trade up" to a more valuable piece of property but with substantially the same kind of contract. Still later, when plaintiffs wished to sell, they were induced to transfer their holdings into ten new contracts for less valuable pieces which they subsequently learned could not easily be sold. These trades were based on oral representations and were not provided for in the "security". Defendants assumed no written obligation to sell or transfer plaintiffs' property.

Alleged oral misrepresentations cannot transform a document into a security to bring it within the jurisdiction of this court if the document itself does not satisfy the definition of the statute and the case law. Plaintiffs' effort to shoe-horn their land speculations into the definition of the Securities Acts in our opinion fails. They have alleged only a superficial similarity with the leading cases on this point and have not distinguished their transactions from any other agreement to purchase real estate in undeveloped land. We do not doubt that they were led to expect that their investment could appreciate in value and that much of this would be due to the efforts of the developers (using plaintiffs' money to some extent). However, this is a far cry from a common enterprise in the sense of *Securities & Exchange Commission* v. *Glen W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973); see also *Lino* v. *City Investing Co.*, 487 F.2d 689 (3rd Cir. 1973); *Roe* v. *United States*, 287 F.2d 435 (5th Cir. 1961), *cert. den.*, 368 U.S. 824 (1961).

The parties have attached documents to their briefs and made several unsupported statements therein, but the motion to dismiss is directed solely to the complaint, its allegations and the documents attached thereto. We therefore decide the motion solely upon that pleading and its attachments.

It Is Therefore Ordered, Adjudged And Decreed that the defendants' motion to dismiss the complaint for failure to state a claim is granted.

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Date: June 27, 1974

EXHIBIT B

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

JOHN S. BUBULA and FRANK V. PANTALEO,
Plaintiffs,

v.

THE GRAND BAHAMA DEVELOPMENT COMPANY LIMITED, et al.,
Defendants.

No. 73 C 3131

DECISION ON MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants have filed a motion to dismiss the First Amended Complaint filed in this case on July 10, 1974. Counts I and II of this pleading appear to be substantially the same as the original complaint which we dismissed by an order and decision entered June 27, 1974. No new facts or arguments are advanced by plaintiffs to change this result, and we will stand on that decision.

Count III relies on the Interstate Land Sales Act, 15 U.S.C. §1701 et seq., to sustain a cause of action on the same facts as are alleged in Counts I and II. Defendants do not seriously contest the applicability of the statute but contend that its statute of limitations ran before the amendment was filed. Section 1711 of the Act requires that an action be brought on §1709(a) or (b)(2) within one year after discovery of the wrong and on §1709(b)(1) within two years of the violation.

The first contract complained of in this case was signed by plaintiffs on July 23, 1969. A second contract was signed in May 1971. A third set of contracts were signed in March and April 1972. Four months after that plaintiffs learned of the alleged misrepresentations. The original complaint was filed on December 11, 1973.

F.R.C.P. 15(c) allows amendments to relate back to the original filing date. *Aluminum Company of America* v. *Admiral Merchants Motor Freight, Inc.*, 337 F.Supp. 674, 684 (N.D. Ill. 1972), aff'd 486 F.2d 717 (7th Cir. 1973), *cert. den.* 414 U.S. 1113 (1973). Hence the one-year limitation bars transactions prior to December 11, 1972, which eliminates claims under §1709(a) or (b)(2) of the Act. This leaves §1709(b)(1) available to plaintiffs, which provides a cause of action for violation of §1703. Plaintiffs apparently have sued under this section, and therefore their claims are not barred.

However, we have some doubt that Interstate Land Sales Act applies to the sales in this case, particularly in view of the location of the property on the Grand Bahama Island. This aspect of defendants' motion has not been briefed.

It Is Therefore Ordered, Adjudged And Decreed that the defendants' motion to dismiss Count III of the First Amended Complaint on the ground that, it is barred by the applicable statute of limitation is denied, and the parties are ordered to brief the merits of Count III pursuant to Local Rule 13.

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: December 18, 1974

EXHIBIT "C"

PURCHASERS COPY (PERMANENT)

A. ACCEPTANCE AND GUARANTEE OF YOUR LAND RIGHTS AND PURCHASE PRICE

issued by

The Grand Bahama Development Company Limited with offices at the International Bazaar

Post Office Box F-2666, Freeport, Grand Bahama Island, Bahamas.

(hereinafter called "Development Company")

(A1)

Agreement Number* 32059. Date August 25, 1971

Purchaser(s) Thomas Gatto (A Married Man)

Address 10644 Fairfield Phone 562-7779

City Westchester County Cook State Illinois

Zip Code or 60153

Country U.S.A.

This document, 1 applicable rider(s), and form of deed constitute your agreement to purchase the following property:

Lot 29, Block 21, Subdivision Lincoln Green #3

Lucaya, Grand Bahama Island. Plat or Plan Recorded in the Registry of Records of the Bahama Islands. Nassau. in Book 1440 at pages 195 to 199 inclusive, designated for Four-Plex use.

B. PURCHASE PRICE AND TERMS. All amounts quoted in U.S. Currency (See Note reverse side)

1.	Purchase Price (Cash Price)		$14980.00
2.	Cash Down Payment ($.....rec'd.....19....: $.....due.....19....)		$ N/A
		Month Date	Month Date
3.	Option Equity		$ N/A
4.	Trade in Equity		$2032.99
5.	Total Down Payment		$2032.99

6. Balance Due (Amount Financed & Unpaid Balance of Cash Price) $12947.01

Cash ☐ (Balance Due Payable in ..... days)

Term ☐ (Balance Due Plus Interest Payable in Installments)

The Balance Due on a Term sale plus interest at the rate of 7% per annum on the unpaid balance shall be paid in 120 monthly payments, 119 of $150.12 plus a final payment of $174.13.

The first payment is due and payable on the 10th day of November 1971 and all subsequent payments on the 10th day of each consecutive month thereafter until paid in full.

For U.S. Federal Truth in Lending purposes, the Finance Charge (interest) is $5091.40, the Annual Percentage Rate 7%, the Total of Payments $18038.41, and Deferred Payment Price $20071.40. No extra charge, except interest, is made for a late payment. The Development Company retains the security interest set forth in Note 12 hereto in the above lot until all payments are paid in full.

As a further part of the purchase consideration there shall be paid to the Development Company for Ninety-nine (99) years from date on line A1 above an annual sum at the rate of $150.00 payable annually in advance, and the deed referred to below will convey the property to you subject to uses imposing the payment of such sum on the property as a service charge which will, if unpaid, constitute an encumbrance on the property. (See note on reverse side)

• To be filled in by the Development Company.

C. THIS DOCUMENT IS YOUR GUARANTEE THAT: (Also see Notes on reverse side)

- Your Purchase Price, Interest Rate, and Annual service Charge cannot be increased.
- You do not pay Closing Costs for preparation of your Deed, Opinion of Title, Bahamian Stamp Duty, or Recording Fees.

- You can prepay the Balance Due at any time without penalty, save interest and receive your deed.
- You have an Exchange Privilege as set forth in Note 10.
- Your property will be improved in accordance with the attached Improvement Rider.

D. Agreed and acknowledged as set forth in Note 12 on reverse side hereto on this 25th day of August 1971 at 11 P.M.

/s/Thomas Gatoo

.....

Purchaser

.....

Purchaser

/s/ Jay Lemon

Receipted and Witnessed as to Purchaser(s)
Accepted for the Development Company on this 27 day of September 1971.

The Grand Bahama Development Company Limited.

By ....
Authorized Signature

PLEASE BE SURE TO READ REVERSE SIDE: VERY IMPORTANT

1. This agreement is governed by the laws of the Bahama islands. It is not transferable by you without the written consent of the Development Company Conset of the Development Company will not be unreasonably withheld.

2. This agreement, attached form of deed and applicable Riders (hereby incorporated into this agreement by reference), constitute a contract and the entire agreement between the parties. The purchaser acknowledges that no representations have been made to induce him to enter into this agreement except as are set forth in it.

3. After the Purchase Price, and interest if any, is paid in full the Development Company will supply you with

an Opinion of Bahamian Counsel in the form usual in the Bahamas showing your title to be good and marketable and will convey title free and clear of all liens and encumbrances, by a form of deed with full Statutory Covenants for Title as provided for by Bahamian Law prepared at no cost to you (an English copy of which is attached hereto) to be first duly executed by you, subject only to the exceptions and reservations and conditions and restrictions set forth in the form of deed and the easements for utilities shown on the plat or plan of your Subdivision. The form of deed refers to exceptions and reservations contained in the original Crown Grant, which are the usual exceptions and reservations found in Crown Grants of land in the Bahama Islands and which relate to reservation by the Crown of rights to underlying silver, gold, other precious metals, coal and oil, together with a right to enter and remain as necessary to search for and remove the same. The Development Company will pay the Bahamian stamp duty on the deed and fees for recording with the Registry of Records. At your request the Development Company will also have the deed recorded for you, with the understanding that you will not hold th eDevelopment Company responsible for any delay beyond its control.

4. If the Development Company is unable to obtain an Opinion of Bahamian Counsel as to title to your land in the form usual in the Bahamas for the transfer of real estate, and after the use of reasonable diligence is unable to make the title to your property good and marketable, then it will return to you in full all money (including interest) which you have paid on this property thus releasing both parties from any and all further obligations hereunder.

5. Any notices to be served hereunder shall be sufficiently served on the Purchaser if sent by prepaid registered post addressed to the Purchaser at his last known address and upon the Development Company if sent by prepaid registered post addressed to the office of the Development Company within the Bahama Islands. Any notice sent in accordance with the provisions of this clause shall be deemed to have been served if sent by past Four (4) days after the date upon which the wrapper or envelope containing the same shall have been posted.

6. For the purposes of this agreement "force majeure" shall mean fire, war, acts of God, governmental control, embargo, machinery or power failure, any cause affecting supply of construction materials, or any events beyond the control of the Development Company.

7. The word "Dollar" or symbol $ wherever used in this agreement shall mean "Dollar" in the currency of the United States of America, but the Vendor shall accept payment of all sums due under the terms hereof in any currency in an amount which is fully and freely convertible at the time each payment is made into the amount of United States dollars then due.

8. All annual sums received as a part of the purchase consideration of this Acceptance and Guarantee will be used solely to repair, maintain, improve, construct and operate facilities for the general welfare of land owners in subdivisions developed or to be developed in the future by The Grand Bahama Development Company Limited.

9. Under United States Law, a purchaser must receive a copy of the Property Report filed with the Office of Interstate Land Sales Registration, U. S. Department of Housing and Urban Development in advance of or at the time of his signing this Agreement. The purchaser shall have the option to void this Agreement should he not receive said Property Report. In the event that the purchaser has received the Property Report less than forty-eight (48) hours before executing his Agreement, the purchaser shall have the right to revoke this Agreement within forty-eight (48) hours of the time of signing by the purchaser, except that the foregoing revocation authority shall not apply in the case of a purchaser who (1) has received the Property Report and inspected the lot to

be purchased in advance of signing this Agreement and (2) acknowledges by his signature that he has made such inspection and has read and understood such report.

10. When you have completed all payments the Development Company will at your request before the deed has been executed, offer another lot of the equivalent price if then available for the purpose of immediate building, either in the same subdivision or another subdivision where construction is then in progress, which will be conveyed to you in exchange for the lot purchased under this agreement.

11. This Acceptance and Guarantee constitutes an offer to purchase and is not effective or binding on either party until the Development Company has received from you at its offices in Freeport, Grand Bahama Island, Bahamas, the full amount of cash down payment as shown on line 2 Section B hereto, the copy of this Acceptance and Guarantee marked "Development Company Copy" and the copy of this Acceptance and Guarantee marked "Purchaser's Copy (Permanent)" both copies signed by you in the space provided and until the copy of the Acceptance and Guarantee marked "Purchaser's Copy (Permanent)" has been signed in the Bahamas on behalf of the Development Company. The effective date of the resultant contract shall be the date shown on line A1 on revrse side hereto. Your (Permanent) copy will thereupon be posted to you.

12. Acknowledgment: (a) I understand that the Development Company will grant me the following grace periods without penalty if I am unable to make any payment (after this Acceptance and Guarantee becomes effective and binding) exactly on the date due: 60 days if 10% or less of the principal amount of the purchase price has been paid; 90 days if more than 10% but less than 25% of the principal amount of the purchase price has been paid; 120 days if more than 25% but less than 50% of the principal amount of the purchase price has been paid, and 150 days if more than 50% of the principal

amount of the purchase price has been paid. This provision shall not prohibit the accumulation of interest for the period of time the contract may be in default. I further understand that at least 14 days prior to the expiration date of such grace period the Development Company shall notify me in writing, by certified, or registered mail, of the amount then due under this agreement and the exact expiration date of such grace period and that I shall not be deemed in default in the payment of any installment due under this agreement unless and until such notice shall have been given. *I understand that although I am under no personal liability to make any payments on this contract,* since the Development Company has taken this property off the real estate market and will be turning away other prospective purchasers as well as incurring development and other expenses in connection with this sale, all prior payments made by me will be retained by the Development Company as agreed upon and as liquidated damages in the event that I fail to make any required payment on the purchase of this property exactly on the date due or within the grace period as set forth herein *or in the event this contract is not brought current within said grace and neither party will have any further claim against the other.* (b) I acknowledge that I have read and understand the property report filed with the Office of interstate Land Sales registration, and that I have not inspected the property covered by this agreement. I also acknowledge receipt of a copy of the form of Deed.

(c) Each purchaser shall initial one of the following statements:

T.G. I acknowledge that I expect to use this property for investment or income producing purposes and I do not expect to use it as my residence.

I acknowledge that I expect to use this property as my residence.

Signed by the Purchaser(s) this 25th day of August 1971 at 11 o'clock P.M.

Witnessed:

/s/ Jay Lemon	/s/ Thomas Gatto
.....	.....
As to Purchaser	(Purchaser's Signature)
	.....
	(Purchaser's Signature)

This document was designed by legal counsel for

THE GRAND BAHAMA DEVELOPMENT COMPANY LTD

EXHIBIT D

State Of Illinois

Illinois Installment Land Sales Section

PUBLIC PROPERTY REPORT

OF

The Grand Bahama Development Company Limited

LUCAYA

Subdivision Units

BARBARY BEACH

DEVONSHIRE UNIT 1

WINDERMERE

Located in Lucaya, Grand Bahama Island, Bahamas

January 1969

THIS REPORT IS FILED WITH THE ILLINOIS INSTALLMENT LAND SALES SECTION AS REQUIRED BY LAW. HOWEVER, THE FILING DOES NOT CONSTITUTE AN ENDORSEMENT OF THE PROPERTY, AND THE DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS HAS NOT, IN ANY WAY, PASSED ON THE MERITS OF THE LAND BEING OFFERED FOR SALE OR LEASE.

PROPERTY REPORT

Part I—General

1. Name of Subdivider:
   The Grand Bahama Development Company Limited.
   Address:
   International Bazaar, Freeport, Grand Bahama Island, Bahamas.
2. Name of Subdivision and units or area covered:
   LUCAYA: Sub-units known as—
   Barbary Beach
   Devonshire Unit 1
   Windermere
3. Legal Title Holder:
   The Grand Bahama Development Company Limited.
4. Name and address of principal Illinois broker(s) selling subdivision's land:
   Bahama International Realty, Robert Trackman, President, Suite 600, 154 E. Erie Street, Chicago, Illinois. Phone 944-6535.
   (a) Name and location of person who will hold copies of documents relative to transactions with Illinois purchasers:
   Robert Trackman, Suite 600, 154 E. Erie Street, Chicago, Illinois. Lucaya, Grand Bahama Island, Bahamas.
5. Location:
   (a) Describe route to Subdivision:
   Easterly from Freeport on Sunrise Highway and Midshipman Road.
   (b) Briefly describe the general area surrounding the Subdivision including the existence of any nearby towns or communities and distance thereto:
   Gently rolling pineland with a

limestone coral base with the flora and fauna typical of tropical climates. Freeport with an estimated population of 20,000 is 14 miles from the centre of the Subdivision.

6. Size of Subdivision:

948 lots.

NOTE: This is the total number of lots in the subdivisions, and does not reflect those sold or under contract for sale.

7. Have the individual parcels or tracts offered for sale ever been surveyed and platted?

Yes.
Surveyed by E. R. Brownell, Registered Florida Land Surveyor.
Plats were recorded in the Registry of Records, Registrar General's Office, Nassau, New Providence Island, Bahama Islands.

(a) Will each parcel or tract offered for sale be marked so that it can be located by the purchaser?

Lots are not individually staked; however, permanent Monuments and Control Points enable any Surveyor to locate individual lots.

8. What public transportation is available to the subdivision?

None.

What shopping facilities are nearby? How far are these from the centre of the Subdivision?

A complete spectrum of shopping facilities, retail stores and services are available in Freeport which is approximately 14 miles from the centre of the Subdivision.

Part II—Land Use

9. Briefly describe the present topographical characteristics of the land:

Gently rolling pineland with a limestone coral base and elevation range from 5′ to 30′ above Mean Low Water.

10. Is the subdivision, or any parcels or tracts thereof, covered by surface water at any time of the year?

No.

11. For what purpose or use ..... individual tracts or parcels offered ..... be put in their present condition?

Lots cannot be used in their present condition. Upon completion of the promised improvements (see Question 14) the lots may be used for the purposes set forth in Question 23-B.

12. Have any homes been completed in the Subdivision?

No.

13. Summarize all restrictions, easements or reservations affecting the Subdivision or the afforded parcels or tracts:

ALL restrictions, easements or reservations are set forth in the sales contract and the ..... which are a part of the contract and should be read by the purchaser. Mineral rights are reserved ..... Crown as is customary in the Bahamas.

NOTE: All construction must comply with the Building and Sanitary Code and any other applicable laws or regulations.

Part III—Improvements

14. If there is a plan of development for the entire subdivision, describe and detail the nature of the improvements to be made and when these will be in:

The Development Company promises to, within sixty (60) months from the date of acceptance of the signed

purchase agreement, bring to Barbary Beach and Windemere primary electricity, main water and road paving adjacent to the property boundary line and to Devonshire primary electricity and road paving adjacent to the property boundary line.

15. Are the following presently available to the Subdivision or to any of the individual parcels or tracts offered for sale, and who will supply these?
(List the cost to an individual lot owner for connecting the same.)

Electricity: NO. Freeport Power Company, Limited. Refundable meter deposit of $60.00 is presently required. Monthly Residential Rater:

First 30 KWH	B$	.070 per KWH
Next 500 KWH	$	.050 per KWH
Next 280 KWH	$	.045 per KWH
Additional KWH	$	.030 per KWH

Telephone: NO. The Grand Bahama Telephone Company Limited. Refundable deposit of $30.00 is presently required.
Residential Telephone Charges:

Installation	$10.00 per month
Private line	8.07 per month
Two-party line	6.63 per month

Sewage Disposal: NO. (At purchaser's expense.) Cased well one-compartment septic tank. Single family dwelling cost is estimated at $650. Since cost is related to density, it is not possible to provide an estimate on lands zoned other than single family. In some cases of multiple dwelling, a Package Treatment Plant may be required.

Gas: YES. Bottled gas through retail commercial outlets. Price: 39c-56c per gallon depending on usage.

Water: NO. The Grand Bahama Utility Company, Limited. Refundable tapping charge of

$56.00 plus a refundable $30.00 water meter deposit.
Residential rate $1.14 per 1,000 gallons, flat.

NOTE: Rates in effect 30 September 1969 for single family residence. Such rates may change from time to time as indicated by economic needs and conditions.

Part IV—The Contract And Title

16. At the time the deed is required to be delivered to the purchasers, will all parcels or tracts in the subdivision be accessible by conventional automobile?
Under an instalment contract, Yes. See Question 14.

NOTE: Cash purchase or prepayment of an instalment contract does not accelerate the completion date of the promised improvements.

Who will care for future care and maintenance?
The Development Company has made the following provisions:
Purchasers will pay an annual service charge in accordance with the terms of the Contract and Deed.
These sums will be used solely for the purposes of building, maintaining and improving roads, drainage, walkways, utilities, waterways, bulkheads, parks, beaches and other community facilities on land developed for sale by the Development Company.
A schedule of the annual service is available upon request.
The Acceptance and Guarantee (Sales Contract) and Deed provide detailed information and should be carefully read.

17. What is the distance to the available schools in the area?
Elementary and high schools—public and parochial —are 11 to 14 miles from the centre of the Subdivisions.

NOTE: Purchasers should contact the local schools regarding school facilities and bus service.

18. Is fire protection provided and by whom?
The Bahama Fire Service of the Bahamas Government.

19. What additional sum will the purchaser be required to pay other than actual purchase price in connection with their purchase or ownership of lots in the Subdivision, aside from taxes, stamps, recording cost and assessments validly imposed by governmental authority? SEE QUESTION 6 AND 23.

20. Is there a refund privilege.
No.

SALES MAY BE MADE ON CONTRACTS OF SALE. PROSPECTIVE PURCHASERS SHOULD READ AND UNDERSTAND THE TERMS OF THESE CONTRACTS BEFORE SIGNING THEM.

21. Will the purchaser receive an insurable title?
Yes.

If yes, at whose expense?

Purchaser may obtain Title Insurance Policy at his expense.

Part V—Mortgages

22. (a) Is part of your Subdivision encumbered by a blanket mortgage?
No. There is a Debenture that creates a Floating Security and under which the Development Company has an absolute right to convey title in the ordinary course of business.

Part VI—Summary And Other Data

23. Other pertinent factors that may amplify, explain or add to any anwers previously given in this Property Report:

A. Contract Rider:

In respect of the promised improvements, certain Riders to the Contract pertaining to road paving and utilities are applicable to specific Subdivisions and should be attached to and form a part of the Purchase Agreement.

(i) The cost of servicing a building with individual water and electricity lines must be borne by the Purchaser.

B. Zoning.

BARBARY BEACH =	Multi-family/Hi-rise & Tourist Commercial
DEVONSHIRE UNIT 1 =	Duplex
WINDERMERE =	Multi-family (4-plex)

C. Terms And Conditions Of Sale:
Sales may be made for cash or on an installment basis:

1. Cash Sales:
   (a) The purchaser will receive a cash discount as scheduled herein:

List Price Of Property	Cash Discount
Sales—$4,999 or less	7%
Sales—$5,000 to $9,999	8%
Sales—$10,000 and more	9%

2. Term Sales:
   (a) Down payment is a minimum of 20% of the contract price;
   (b) Monthly payments, to include principal and accrued interest, amortize the contract balance over the term of the agreement not to exceed seven (7) years;
   (c) Conventional interest is charged at the rate of 6% per annum on the unpaid principal balance;

(d) Purchaser shall have the right to pre-pay at any time the balance due upon the contract without penalty;

(i) After thirty (30) days of the date of the signed purchase contract, the purchaser will, upon pre-payment in full of the principal balance remaining due under the contract together with any accrued interest, be entitled to a discount in the amount of 10% of the principal balance being pre-paid.

3. Cash purchase or pre-payment of an insufficient contract does not ..... the completion date of promised improvements.

4. Also, see the Acceptance and Guarantee (Sales Contract) and any applicable Riders thereto and the Deed.

D. Exchange:

When the purchaser has completed all payments, the Development Company will upon request before the deed has been executed, offer another lot of the equivalent price if then available for the purpose of immediate building, either in the same subdivision or another subdivision where construction is then in progress which will be conveyed in exchange for the lot originally purchased.

E. Inspection:

In order that a purchaser may inspect his selected lot, he may for a limited time only and under specified circumstances, reserve a lot upon payment of a sum not to exceed $250, for an inspection trip which sum is not refundable; however, upon purchase, the purchaser will be allowed a credit in like amount against the purchase price.

F. Resale:

The Development Company does not engage in negotiating resales of land or of purchasers' interests in installment contracts. Any such resale, transfer of

contract interest, or assignment can be affected by the purchaser himself or with the help of any real estate broker he may select. Any assignment of interest in a contract requires the written consent of the Development Company. Consent will not be unreasonably withheld if the new person assumes all conditions of the original contract and its riders.

G. Dollar Conversion:

The word "Dollar" or symbol "$" wherever used in the purchase contract shall mean "Dollar" in the currency of the United States of America, but the subdivider agrees to accept payment of all sums due in any currency in an amount which is fully and freely convertible at the time each payment is made into the amount of United States dollars then due.

H. Deed:

Upon payment in full for a homesite, each purchaser will be given the following:

(1) Deed with full Statutory Covenants for Title in the form usual in the Bahamas.

(2) An opinion of Bahamian Counsel showing the Title to be good and marketable, subject to the exceptions and reservations in the Deed and Contract.

Copies of Deeds are filed with the Department as Exhibits, and are also attached to and form a part of the Purchase Agreement.

SPECIAL NOTE: * * * * THIS DEPARTMENT RECOMMENDS THAT YOU SEE BEFORE BUYING.

NOTE: A PROGRESS REPORT IS AVAILABLE OF THE WORK, IMPROVEMENTS AND INSTALLATIONS COMPLETED AND IN PROGRESS IN ACCORDANCE WITH AN AGREED COMPLETION SCHEDULE AND IS FILED WITH THE DEPARTMENT EACH MONTH.

FILED
OCT 8 1979
MICHAEL RODAK, JR., CLERK

No. 79-325

In the

Supreme Court of the United States

OCTOBER TERM, 1979

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et al.,

Petitioners,

vs.

CLARENCE A. ANDERSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

WILLIAM J. HARTE
MARTHA M. MILLS
JAMES P. CHAPMAN
EDWARD T. JOYCE
111 W. Washington Street
Chicago, Illinois 60602
Tel. No. 312-726-5015

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Questions Presented 1

Statement of the Case 1

Summary of the Argument 3

Reasons for Denying the Writ 4

I. The Allegations Of The Complaint, Which Must, For Purposes Of This Appeal, Be Taken As True, Clearly State A Violation Of The Illinois And Federal Securities Laws Entitling Plaintiffs To Be Heard On The Merits Of The Controversy 4

II. The Definition Of What Constitutes An Investment Contract Clearly Covers The Subject Land Installment Contracts 10

Conclusion 13

TABLE OF AUTHORITIES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), reh. denied, 407 U.S. 916, reh. denied, 408 U.S. 931 9

Brothers v. McMahon, 351 Ill. App. 321, 327, 115 N.E. 2d 116, 118 (1st Dist. 1953) 12

Chasins v. Smith-Barney & Co., 438 F.2d 1167 (2nd Cir. 1970) 10

In re McCormicks' Estate, 284 Ill. App. 543, 1 N.E.2d 769 (1st Dist. 1936) 12

Lowery v. Ford Hill Investment Co., 556 P.2d 1201, 1205 (Colo. 1976) 11

Polikoff v. Levy, 55 Ill. App.2d 229, 204 N.E.2d 807, 809 (1st Dist. 1969) 12

SEC v. Electronics Security Corp., 217 F. Supp. 831 (D. Minn. 1963) 10

Woodward v. Terracor, 574 F.2d 1023 (10th Cir. 1978) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et al.,

Petitioners,

vs.

CLARENCE A. ANDERSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIFTH DIVISION

QUESTIONS PRESENTED

1. Is this case ripe for consideration in view of the fact that the Appellate Court's decision simply ruled that respondent's complaint stated a cause of action under federal and state securities laws.

2. Did the Appellate Court properly rule that the complaint stated a cause of action under both the state and federal securities laws.

STATEMENT OF THE CASE

This is a class action, in four counts, by respondents, certain Illinois residents, who were sold interests in un-

improved property in Lucaya, Grand Bahama Island, by the defendants. They sought relief in three counts under the Illinois Securities Law of 1953 (Ill. Rev. Stat., Ch. 121½, §§137.1 et seq.), or under the Securities Act of 1933 (15 U.S.C., §77a et seq.), because the interests purchased by respondents constituted securities, or investment contracts, within the meaning of either the Illinois or Federal Acts. Because of alleged representations and and misrepresentations, respondents sought rescission and other relief. The complaint also contained a Count IV for violation of the Interstate Land Sales Act (15 U.S.C., sec. 1709).

The trial court dismissed the first three counts relating to alleged violations of the Illinois and federal securities laws and entered an appropriate finding rendering the order final and appealable under Illinois Supreme Court Rule 304(a) [ch. 110, sec. 304(a), Ill. Rev. Stat.]. The cause remained at the trial level to adjudicate the alleged Interstate Land Sales Act violation and respondents appealed from the order dismissing the alleged securities law violations.

The Appellate Court, Fifth Division, by unanimous decision appearing in the Appendix to the Petition, reversed the order of the trial court, holding in essence that "plaintiffs (respondents here) have made the proper allegations in support of a finding that an investment contract existed so as to withstand defendants' section 45 (Illinois Civil Practice Act) motion."

Petitioners petitioned the Supreme Court of Illinois for leave to appeal from the Appellate Court's unanimous decision, and that Court by summary order, denied the petition,

SUMMARY OF THE ARGUMENT

The Appellate Court's decision means only that respondents may litigate their claims that *these defendants* promoted *the real estate in question here,* located in the Grand Bahamas, as *investments.* This case does not involve the development of real estate in any area in the United States.

The advertising and promotional materials used by the petitioners nationwide, and particularly in the Illinois area, are replete with pleas for investment money, replete with references to opportunities for both the "professional" and "non-professional" investor, replete with claims that real estate is the best hedge against inflation and the quickest and surest way to get rich, and that as the value of land in the Lucaya development goes up, and people desire that land to build houses, apartments, hotels or businesses, they must come to the people who own land to get it. The petitioners even stated that "many astute investors recognized the enormous potential here quite early in the game. Some of them have already reaped the rewards of their foresight." (E.g., C135-145, C171-172).

This case has not been decided on the merits, but only on a motion to dismiss. The Appellate Court's decision in that regard contravenes no other decision of this Court, any federal Court or any other Court to respondents' knowledge. *Woodward* v. *Terracor,* 574 F.2d 1023 (10th Cir. 1978), upon which petitioners principally rely, is wholly inappropriate because it has no relationship to the facts in this case or to the conduct of defendants in this case. Moreover, *Woodward* was decided on a motion for summary judgment where the parties had the opportunity to litigate the issues.

There is no compelling reason, in fact no reason at all, for this Court to accept review of this case at its present stages.

REASONS FOR DENYING THE WRIT

I.

THE ALLEGATIONS OF THE COMPLAINT, WHICH MUST, FOR PURPOSES OF THIS APPEAL, BE TAKEN AS TRUE, CLEARLY STATE A VIOLATION OF THE ILLINOIS AND FEDERAL SECURITIES LAWS ENTITLING PLAINTIFFS TO BE HEARD ON THE MERITS OF THE CONTROVERSY.

Respondents, on various dates and times, purchased interests in unimproved real property in Lucaya, Grand Bahama Island, from the petitioner, as evidenced by land installment contracts. What the respondents contend is that the sales, viewed in the context of the facts as hereinafter set forth, were much more than simple sales of unimproved real estate. Each sale, the respondents contend, constitutes the sale of a security.

Petitioners herein include first, The Grand Bahama Development Company, Ltd. ("Development Company"), a Bahamian corporation, which was the owner and developer of the real property involved herein. The property purchased by respondents and other similar property owned by Development Company in Lucaya, Grand Bahama Island, will be referred to herein as the "Lucaya Development".*

---

* The Development Company was in reality one member of a related group of corporations involved in the building up, promotion and sale of land in the Lucaya Development. The corporate chart identifies other companies involved. Above the Development Company stands the Grand Bahama Port Authority Ltd., which negotiated a master agreement with the Bahamian government, granting special tax concessions and certain monopoly powers over the Lucaya/Freeport area, in exchange for which

America Devco, Inc. ("Devco"), a Delaware corporation, was the holding company for the United States operations of Development Company, as well as the service representative for Development Company with relation to sales of land in the Lucaya Development.

Bahama Realty Corporation ("Bahama Realty"), a Delaware corporation, was, until December 1, 1974, the holder of the exclusive sales rights in the United States for property in the Lucaya Development.

American International Realty Corporation ("American International"), an Illinois corporation, was the exclusive franchisee or agent of Bahama Realty for the sale in Illinois of property in the Lucaya Development.

Benguet Consolidated, Inc. ("Benguet"), a Philippine corporation, was the parent corporation, or a corporation related to or affiliated with Development Company, Devco and Bahama Realty. (Comp. ¶6, C3-C4; C160-C162) It is not before the Court, as it has not yet been served with process. It was succeeded, however, in December of 1973, in its role as parent corporation by Intercontinental Diversified Corp. ("IDC"), a Panamanian corporation which acquired all of Benguet's interest in Development Company, Devco and Bahama Realty. IDC is before this Court.

It is clear, and respondents do not believe it to be contested, that on a Motion to Dismiss, or motion for Judg-

---

* (Continued)

it was responsible primarily for the development of the Island. The other companies also had roles to play. For example, Lucaya Country Clubs Limited ran golf courses and the Lucaya Service Co. Limited handled maintenance projects on the Island paid for by service fees collected by the Development Company.

ment on Pleadings, all of the well-pleaded facts in the Complaint must be taken as true. The complaint is quite substantial and includes a number exhibits. An affidavit was also filed in support of the complaint.

The respondents have alleged, first, in Count I:

1.-7. Identity and description of parties.

8. Development Company acquired substantially all of the real property in the Lucaya area on Grand Bahama Island.

9. Development Company caused a Master Plan for the development and usage of real property in the Lucaya Development and surrounding areas to be prepared. This Master Plan was followed.

10. Pursuant to the Master Plan, Development Company caused facilities such as schools, recreational facilities, parks, greenways, churches, waterways, water reserves, beaches, marinas, golf courses, shopping complexes and resort hotels to be constructed in and near the Lucaya Development.

11. Development Company caused roads, utilities and other improvements to be constructed on or near the lands purchased by Plaintiffs and others.

12. Development Company had final authority over advertising and promotional materials, and over the form and substance of sales contracts. More importantly, it had the authority to approve every sale, exchange or resale of land in the Lucaya Development (other than sales, exchanges or resales by a fully paid owner holding a deed subsequent to ownership by Development Company). It also had the authority to determine and set prices for and terms of the sale of property in Lucaya.

13. Petitioners instituted a large scale advertising and promotional campaign for the sale of land in the Lucaya Development through newspapers and

magazines of nationwide circulation, direct mail solicitation, group and private dinner meetings, movies and intensive personal follow ups.

14. Part of the advertising and promotional campaign included special charters to the island for on-site inspection, offers of special discounts, and offers of "free" trips to the island, all of which included guided tours, high pressure sales luncheons and compulsory visits to the sales office.

15. The advertising and promotional campaign described in paragraphs 13 and 14 was aimed at any prospective market, but particularly at professional and non-professional purchases of land for *investment purposes only.*

16. Paragraph 16 describes in a number of subparagraphs specific advertising and promotional materials, each of which actually confirms and supports respondents' claim here that the offer and the holding out of economic inducements to the respondents, were aimed at investors. They even suggested in some advertising that prospective investors should act quickly, that land was in short supply, and that some early investors in the Lucaya Development have already reaped the rewards of their foresight.

17. All of the allegations of paragraphs 8-16, can be supported by written materials, published and circulated by petitioners to respondents.

18. Many of the respondents were required to indicate on their acceptance and guarantee contract with Development Company that "I acknowledege that I expect to use this property for investment or income producing purposes and I do not expect to use it as my residence." Each of the respondents could have checked a separate acknowledgement that stated "I acknowledge that I expect to use this property as my residence." They did not do so.

19. Each of the facts alleged in Paragraphs 8-18 are representations that the purchase of land in the

Lucaya Development is an "investment" and that the Development Company will make that investment one of value by virtue of its Master Plan, the construction of community facilities and improvements to property, and its massive advertising and promotional campaign.

20. The advertising and promotional materials made it clear that the land purchased by investors such as respondents would become valuable and saleable to tourists, persons who constructed housing, and persons who established businesses, solely by virtue of the development, advertising and promotion of the island and of the Lucaya Development by Development Company. *Persons purchasing land for investment purposes could not do anything to increase the value of their investment nor was it the intention of the Development Company or the defendants that they do so.*

27-42. These paragraphs set for the allegations necessary to state a violation of the Illinois Securities Act by reason of the non-registration of the securities at the time of sale or since.

Count II of the complaint repeats and realleges many of the allegations from Count I, and then sets forth the requisite allegations of a cause of action for violation of the Federal Securities Laws, by reason of non-registration.

Count III repeats and realleges the major allegations of Count I, and then alleges violations of the antifraud sections of the Federal Securities Act. These violations include the making of many affirmative misrepresentations, *i.e.*, that there was a large and active resale market for land in the Lucaya Development, that that land would increase in value, that investors would be able to sell their investment contracts at a profit or

"trade up" to more valuable property, that other people had made substantial profits, and that Development Company's efforts would result in the Lucaya Development increasing in value without any effort on the part of investors.

Count III also alleges affirmative failures to disclose a number of important facts. Defendants failed to disclose that increases in the value of investments in the Lucaya Development were primarily dependent on the unilateral actions of Development Company in periodically increasing the prices of the Lucaya Development property. These sales prices bore no reasonable relation to the fair market value of the land. Defendants also failed to disclose that an investor desiring to resell or cash in on his investment interest would be in direct competition with the Development Company which offered favorable, long-range purchase options, and which had substantial reserves of property. Moreover, the petitioners failed to disclose that the Development Company dominated the resale market for the Lucaya Development land in that resales of land were handled by Intercontinental Realty Company, Ltd., a related corporation, which agreed with Development Company not to resell land for less than the current prices being charged by Development Company.

Though the merits of the claim set forth in Count III are at issue here only insofar as the Trial Court ruled that the facts pleaded as a matter of law did not state a claim because the interests purchased were not investment contracts or securities, it is clear that there is liability under the securities antifraud provisions for failure to disclose to a buyer the sellers' own competing interests in a market or "market making." *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972), *reh. denied,* 407

U.S. 916, *reh. denied,* 408 U.S. 931; *Chasins* v. *Smith-Barney & Co.,* 438 F.2d 1167 (2nd Cir. 1970). See also *SEC* v. *Electronics Security Corp.,* 217 F. Supp. 831 (D. Minn. 1963).

Under the facts alleged, with Development Company controlling both the primary market and the resale market, investors were really locked in to their purchases. They were unable, practically speaking, to take their loss and walk away as Intercontinental would not undersell petitioners. While theoretically free to engage private brokers to effect a sale, investors rarely were successful in doing so—in part because even if they were willing to sell at a loss, the sale still competed with the long-term favorable financing of petitioners who were selling property with down payments of as little as 5 or 10 per cent.

II.

THE DEFINITION OF WHAT CONSTITUTES AN INVESTMENT CONTRACT CLEARLY COVERS THE SUBJECT LAND INSTALLMENT CONTRACTS.

Respondents submit that the Appellate Court's decision succinctly discusses the applicable precedent controlling the definition of a security, under both the federal and state statutes. More significantly, the Court, in its Opinion, related this precedent to the instant complaint regarding *these petitioners and their alleged conduct,* not a real estate developer in any other hypothetical area under other hypothetical conditions. A few further remarks are appropriate, however.

Petitioners' great cry is that all they were doing was providing the usual "customary amenities" provided by any developer. While respondents vigorously dispute this

conclusion, they submit that at this stage of the proceeding, petitioners' characterization is irrelevant.

In the instant case, respondents purchased their properties solely for investment purposes. However, it would not have made a difference if there had been a secondary purpose of using the land for personal recreational use. In *Lowery* v. *Ford Hill Investment Co.,* 556 P.2d 1201, 1205 (Colo. 1976), the Colorado Supreme Court interpreted it *the Colorado state securities laws* to hold that a land purchase contract was a security. The court stated:

> Despite the finding by the trial court of a "secondary" purpose of personal recreational use, this subordinate motive for the purchase does not sufficiently eclipse the plaintiffs' primary purpose of an "expectation of profit."

The court concluded that while the trial court found that the "juxtaposition of purposes" presents a difficult question, it would look to the nature of the contract. It found that various aspects of that contract, irrelevant here, caused the "investment purpose to pervade the transaction". It found further, that there was no factor in that case which would remove it from the category where the purchaser was "led to expect profits *solely* from the efforts of the promoter or a third party." 556 P.2d at 1206. Certainly that is equally true here.

It has long been clear that the Illinois courts will give an expansive reading to the Illinois Securities Law so that it might serve its regulatory and protective function, and will look to the realities of a case, not merely to form.

> The courts have given the term "security" a broad construction and have held that the acts are pater-

> nalistic and hence are to be liberally construed to protect the public. In determining whether an instrument is a security within the meaning of the statute, the Courts look to the substance of the transaction, to the relationship between the parties; these elements will control as against the form of the instrument. Form is disregarded for substance and emphasis is placed on economic reality. *Polikoff* v. *Levy,* 55 Ill. App.2d 229, 234, 204 N.E.2d 807, 809 (1st Dist. 1969).

In *In Re McCormicks' Estate,* 284 Ill. App. 543, 1 N.E. 2d 769 (1st Dist. 1936), the court set forth the Illinois test for the existence of an investment contract. Though the test did not encompass the scheme in the *McCormick* case, it does encompass the scheme of the petitioners here. The question there was whether the real estate contract:

> . . . contemplated an investment of funds by the purchaser in the assets or property of the issuer with a view of receiving a profit through the efforts of the issuer." As quoted from *Brothers* v. *McMahon,* 351 Ill. App. 321, 327, 115 N.E.2d 116, 118 (1st Dist. 1953).

As we have stated heretofore, *Woodward* v. *Terracor,* 574 F.2d 1023 (10th Cir. 1978) is not controlling, persuasive or even relevant to the facts *in this case.* Moreover, the *Woodward* decision concerned a summary judgment motion.

Plaintiffs, at the very minimum, should have the right to proceed beyond the pleading stage in this case.

CONCLUSION

For the reasons given, plaintiffs submit that there is no reason whatever for this Court to accept this case for review at this stage of the proceedings.

Respectfully submitted,

WILLIAM J. HARTE
MARTHA M. MILLS
JAMES P. CHAPMAN
EDWARD T. JOYCE
111 W. Washington Street
Chicago, Illinois 60602
Tel. No. 312-726-5015
Attorneys for Plaintiffs-Respondents

Supreme Court, U. S.
FILED
OCT 11 1979
MICHAEL RODAK, JR., CLERK

No. 79-325

IN THE

Supreme Court of the United States

October Term, 1979

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et. al., *Petitioners,*

vs.

CLARENCE A. ANDERSON, et al., *Respondents.*

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Fifth Division

PETITIONERS' REPLY MEMORANDUM

FRANCIS D. MORRISSEY
THOMAS F. BRIDGMAN
PETER J. MONE
BAKER & MCKENZIE
130 E. Randolph Drive
Chicago, Illinois 60601
312/861-2819

ROGER C. MINAHAN
MINAHAN & PETERSON, S.C.
815 E. Mason Street
Milwaukee, Wisconsin 53202
414/276-1400

Attorneys for the Petitioners, The Grand Bahama Development Company, Ltd., a Bahamian corporation; America Devco, Inc., a Delaware corporation; American International Realty Corporation, an Illinois corporation; Intercontinental Diversified Corp., a Panamanian corporation; and Bahama Realty Corporation

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

No. 79-325

IN THE

Supreme Court of the United States

October Term, 1979

THE GRAND BAHAMA DEVELOPMENT COMPANY, LIMITED, a Bahamian corporation, et. al., *Petitioners,*

vs.

CLARENCE A. ANDERSON, et al., *Respondents.*

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Fifth Division

---

PETITIONERS' REPLY MEMORANDUM

Petitioners submit this memorandum in reply to new matters raised by respondents in their brief in opposition to the Petition for Certiorari.

Argument

1. Respondents argue that the federal and Illinois securities laws should be given an expansive reading and applied to the contracts for the purchase of residential lots in real estate developments involved here (Br. in Opp. 10-12). They assert that any investment in land in a real estate development which includes plans for customary amenities such as roads, recreational facilities and parks is a security in the form of an investment contract.

The expansive application of the securities laws urged by respondents and adopted by the Appellate Court of Illinois in this case would work a severe hardship on sellers of land while adding little to the rights and remedies of buyers. Sellers who have not registered sales of land with securities commissions in reliance on past administrative pronouncements and judicial decisions would suddenly be faced with massive liabilities for their failure to comply with the securities laws. They would also face a heavy burden in complying with those laws in the future and would become less willing to offer purchasers any improvements or amenities along with subdivision tracts. On the other hand, land buyers already have adequate and effective remedies against sellers under the federal Interstate Land Sales Full Disclosure Act and state land sales acts.

Obviously many persons who purchase real estate, including many of those who purchased land from petitioners, do so in whole or in part for investment purposes. Only particular investments, however, are securities as that term is used in connection with the federal and state securities laws. The key element that makes an investment a security is the participation of the investor in a common enterprise where profits are to be derived solely from the efforts of others. That essential element is simply not present in this case.

Congress and the state legislatures never intended the securities laws to cover the type of land sales involved here. The Appellate Court of Illinois should not be permitted to expand the securities laws to achieve such a result.

2. Respondents err in contending that the Appellate Court's judgment is not ripe for review because it is not

a final decision on the merits but only a reversal of the trial court's order granting petitioners' motion to dismiss (Br. in Opp. 1, 3). However, this Court has frequently reviewed such judgments. In actions involving securities laws in particular, petitions for certiorari by defendants have been granted in a number of cases in which courts of appeals have sustained causes of action which had been dismissed by trial courts. See *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975); *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976); *Teamsters v. Daniel,* — U.S. —, 58 L.Ed.2d 808 (1979).

Since resolution of the issue presented by the Petition for Certiorari is "fundamental to the further conduct of the case," review of the Appellate Court's decision at this time is manifestly appropriate. See *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945); *Land v. Dollar,* 330 U.S. 731, 734 n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 n.3 (1949). Reversal of the Appellate Court's decision would also eliminate the need for a lengthy and complex trial on respondents' claims under the federal and state securities acts.

3. Respondents correctly state that on a motion to dismiss all of the well pleaded facts in a complaint must be taken as true (Br. in Opp. 5-6). But it is also well settled that such a motion does not admit conclusions of law or inferences and conclusions as to matters of fact contained in the complaint. See *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Missouri Pac. R. Co. v. Norwood,* 283 U.S. 249, 254 (1931); *Pierce Oil Corp. v. City of Hope,* 248

U.S. 498, 500 (1919); *Unger v. Checker Taxi Company,* 30 Ill. App. 2d 238, 174 N.E.2d 219, 221 (1961); *Kurek v. Kavanagh, et al.,* 50 Ill. App. 3d 1033, 365 N.E.2d 1191, 1194 (1977).

In order to state a cause of action, respondents must directly allege facts which, if true, would establish that the land contracts were investment contracts under the definition in *SEC v. W. J. Howey Co.,* 328 U.S. 293, 298-299 (1946):

> "[A]n investment contract for purposes of the Securities Act means a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . ."

Paragraphs 1 through 18 of the complaint in this case contain allegations regarding the identity and description of the parties to the suit, petitioners' plans for real estate developments on Grand Bahama Island, and petitioners' efforts to promote the sale of lots in those real estate developments (Br. in Opp. 6-7). Paragraphs 19 and 20 of the complaint contain conclusory statements that the facts alleged in paragraphs 1 through 18 establish that the lots purchased could increase in value solely through the efforts of petitioners and that respondents could do nothing themselves to increase the value of their investments (Br. in Opp. 7-8).

Respondents have not supported these assertions by direct allegations of fact showing that they were prevented from developing their lots and thereby enhancing the value of their investments, because they could in fact have made such improvements. Yet the Appellate Court expressly and improperly based its decision on these conclusory assertions.

Furthermore, the contracts entered into between petitioners and respondents which were attached as exhibits to respondents' complaint contained no promises, representations, or agreements that petitioners would develop, control, or manage the land purchased for the benefit of respondents. These documents refute the assertions in respondents' complaint that petitioners and respondents were engaged in a common enterprise. Where allegations in a complaint are in conflict with facts disclosed in exhibits, the exhibits must control. See *Wilbur Waggoner Equipment Rental Co. v. Johnson,* 33 Ill. App. 3d 358, 342 N.E.2d 266, 269 (1975); *Sangamon County Fair Assn. v. Stanard,* 9 Ill. 2d 267, 137 N.E.2d 487, 493 (1956); *Wilbur v. United States,* 288 U.S. 97, 101 (1933).

The direct allegations of fact in respondents' complaint, even when taken as true, do not establish that petitioners and respondents were embarked on a common enterprise, nor do they establish that respondents had to rely solely on the efforts of petitioners to increase the value of their investments.

4. Respondents argue that the Appellate Court discussed all the applicable precedent controlling the definition of a security (Br. in Opp. 10). Yet the Appellate Court relied heavily on *McCown v. Heidler,* 527 F.2d 204 (10th Cir. 1975), a case subsequently limited by *Woodward v. Terracor,* 574 F.2d 1023 (10th Cir. 1978), which was not considered by the Appellate Court. Moreover, the Appellate Court did not consider this Court's decision in *United Housing Foundation, Inc. v. Forman, supra,* in which the *Howey* test was applied to interests in real estate, nor did it consider *Teamsters v. Daniel, supra,* which was decided by this Court subsequent to the Appellate Court's decision.

Respondents erroneously assert that *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201 (Colo. 1976), stands for the proposition that simple land contracts are securities, whether the purchase is made for investment purposes or for personal use (Br. in Opp. 11). What *Lowery* actually held was that contracts for the sale of condominium units constituted "investment contracts" within the meaning of the Colorado Securities Act where the sales were accompanied by mandatory agreements imposed by the seller under which purchasers of the units were required to pay fees to the seller and to rent their units through a common agent employed by the seller who distributed shares of the rental income received to the owners of the units.

The Colorado Supreme Court stated that "[w]hile this court is not bound by federal law in the interpretation of the Colorado Securities Act, we find that insofar as the provisions and purposes of our statute parallel those of the federal enactments, such federal authorities are highly persuasive." It went on to hold that the venture in question was a common enterprise within the meaning of the *Howey* formula. *Lowery, supra,* at 1204-1205.

One of the factors relied on by the court in *Lowery* was the pronouncement of the Securities and Exchange Commission in "Offers and Sales of Condominiums in a Real Estate Development," SEC Release No. 33-5347, 38 Fed. Reg. 1735 (Jan. 18, 1973), which set forth the Commission's opinion that the mere offer and sale of condominium property or land in a real estate development does *not* constitute a securities transaction under federal law. Condominium offerings only involve securities, the Commission stated, when coupled with rental pool arrangements run by exclusive rental agents.

Respondents also refer to *In Re McCormick's Estate,* 284 Ill. App. 543, 1 N.E.2d 769 (1936) (Br. in Opp. 12). That case involved contracts for the sale of lots in a subdivision which provided that the developer would install certain public improvements such as sewers, pavements, water and gas mains, and landscaping in the subdivision. The Illniois court held that a sale of securities was *not* involved, noting that those who purchased the lots "had no interest whatever in any of the other lots in the subdivision or in any property belonging to the vendors or the proceeds thereof," and reasoning that "if the Legislature had desired to include ordinary sales of real estate in the Illinois Securities Law, it would have been a simple matter for them to have done so." *In Re McCormick's Estate, supra,* at 772.

Lowery and *In Re McCormick's Estate, supra,* both support petitioners' argument that land contracts of the type involved here are not securities in the form of investment contracts.

Conclusion

The question raised by this case is whether contracts for the purchase of residential lots in a real estate development constitute securities in the form of investment contracts within the meaning of federal and state securities acts when the development includes plans for public facilities and other amenities which serve the lots involved.

The Appellate Court of Illinois has held that such land contracts constitute securities. Its decision is at variance with applicable decisions of this Court in the securities area and is in direct conflict with decisions of federal courts of appeals and federal district courts which have considered this question.

The issue involved here is of major importance to purchasers and sellers of real estate and directly affects the administration of federal and state securities laws. It deserves resolution by this Court.

Respectfully submitted,

FRANCIS D. MORRISSEY
THOMAS F. BRIDGMAN
PETER J. MONE
BAKER & MCKENZIE
130 E. Randolph Drive
Chicago, Illinois 60601
312/861-2819

ROGER C. MINAHAN
MINAHAN & PETERSON, S.C.
815 E. Mason Street
Milwaukee, Wisconsin 53202
414/276-1400

Attorneys for the Petitioners, The Grand Bahama Development Company, Ltd., a Bahamian corporation; America Devco, Inc., a Delaware corporation; American International Realty Corporation, an Illinois corporation; Intercontinental Diversified Corp., a Panamanian corporation; and Bahama Realty Corporation